

**CRIMINALIZATION OF SAME-SEX RELATIONS AND FORCED MIGRATION IN
THE 21st CENTURY.
CONTEMPORARY LEGAL AND SOCIO - POLITICAL PERSPECTIVES**

A dissertation submitted for the degree of **Master's in Human Rights and Migration Studies** at the
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(Chrysi Foroglou)

Table of contents

Acknowledgments	4
Abbreviations	5
Abstract	6
Chapter 1	7
Introduction	7
1. <i>Homosexuality in today’s world</i>	8
Chapter 2	11
1. <i>Definitions and terminology</i>	11
2. <i>Homophobia an ongoing issue</i>	13
3. <i>Criminalization</i>	13
Chapter 3	16
<i>Global Protection of Human Rights</i>	16
1. <i>UN resolutions</i>	16
Chapter 4	24
1. <i>The Link between Same-sex relations, Refugees and Forced Migration</i>	24
2. <i>Protection of LGBTQ individuals experiencing forced migration at the global level</i>	25
Chapter 5	28
1. <i>Human Rights Protection in the context of the European institutions</i>	28
2. <i>The work of the Council of Europe</i>	31
3. <i>Cases before the European Court of Human Rights which affect the LGBTQ community</i>	32
4. <i>How is the legal situation today in Europe?</i>	33
1. <i>Historical context</i>	34
Chapter 6	37
1. <i>Homosexual asylum seekers, their origin, and their claims</i>	37
2. <i>UGANDA</i>	39
3. <i>AFGHANISTAN</i>	41
4. <i>IRAN</i>	43
5. <i>BRUNEI</i>	45
6. <i>Criminalization as a criminal offence under domestic penal law</i>	47
Conclusion	49
Bibliography	51

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Abbreviations

CERD Committee on the Elimination of Racial Discrimination
CoE Council of Europe
CSOs Civil Society Organizations
EU European Union
ECtHR European Court of Human Rights
ECHR European Convention on Human Rights
HR Committee Human Rights Committee
HRC Human Rights Council
ICCPR International Covenant on Civil and Political Rights
ICERD International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR International Covenant on Economic, Social and Cultural Rights
ICRMW International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IGLA International Gay and Lesbian Association
IOM International Organization for Migration
LGBTQ Lesbian, Gay, Bisexual, and Transgender
OHCHR Office of the High Commissioner for Human Rights
SGBV Sexual and Gender-Based Violence
SR Special Rapporteur
UDHR Universal Declaration of Human Rights
UNAMA United Nations Assistance Mission in Afghanistan
UNHCR United Nations High Commissioner for Refugees
YP Yogyakarta Principles

Abstract

Consensual same-sex relations between grown-ups are still illegal in almost a third of the United Nations member states. Laws criminalizing homosexuality reinforce systemic discrimination against gay men and women, and bisexuals, as well transgender people. The relevant applied penal codes are internationally known as sodomy laws. Arrests based on sexual orientation accusations, rumors of sexual behavior, or objections to gender presentation may result in torture or other forms of ill-treatment. Consensual same-sex actions or diverse gender expressions, and other less specific provisions, may lead individuals in a life-threatening situation in some legal systems". The present postgraduate thesis attempts to examine this issue, which is a reality not only for those who live in *'traditional'* communities but also for individuals seeking asylum after fleeing harsh environments. Claims that law is rarely enforced are insufficient to render a country secure for those who are still at risk of persecution. Survivors of human rights atrocities may be denied reparation and have no legal recourse. These people frequently decide to flee their home countries and move in pursuit of a better life to another country since they are constantly afraid about their personal safety. Even in 2022, there are some United Nations member States that punish homosexual behavior with the death penalty and many more that impose sanctions such as imprisonment or financial sanctions. The prosecution of homosexuality does not prevent nor is the only obstacle to full equality. Decriminalization is a vital step toward respecting, protecting, and realizing the human rights of lesbians, homosexuals, bisexuals, and transgender people, albeit it is not the full solution. Moreover, it is crucial to acknowledge the improvements made in the international protection of these human rights in Europe and around the world.

Chapter 1

Introduction

“Neither the existence of national laws nor the prevalence of custom can ever justify the abuse, attacks, torture and indeed killings that gay, lesbian, bisexual and transgender people are subjected to.” Ms. Louise Arbour, UN High Commissioner for Human Rights, (UN, Remarks of UNHCR,2006)

Traditional, cultural, and religious beliefs and practices are related with prejudice and abuse that LGBT people frequently face. Human rights are a result of modernity, and LGBTQ rights are generally considered as being on the cutting edge of human rights. Gay rights are related with progress, secularism, and modernism rhetoric. This picture is complicated by a critical approach to worldwide LGBTQ rights practice. (Rahman, 2014) On the one hand, LGBT rights are still a work in progress in the modern Western world depicted in this image, and prejudice and abuse are frequent. Even in the West at the time, LGBTQ rights were not universally recognized. Furthermore, the old religions and cultures merged in this formulation encompass a wide range of gender and sexuality expressions.

On the other hand, such an uncritical account of rights and progress allows LGBT rights to become a vector within broader political formations, undermining the human rights regime's emancipatory normativity by repeating colonial dispositions and practices. A sort of "*homocolonialism*" is authorized by a naive identification of gay rights with progress and its rejection with traditionalism. (Rahman, 2014)

Sexuality and gender politics have specific vectors and valences, and these profoundly impact how human rights work, or don't work, for LGBTQ groups. Similarly, they influence how proponents, opponents, and opportunists utilize human rights, such as homosexual rights, for various political goals. LGBTQ rights can be instrumentalized and utilized as political tools; we've seen them employed for sociopolitical and neoliberal goals. Human rights, on the other hand, are tremendously capable of immanent critique because they are fundamentally about human dignity, equality, freedom, justice, and well-being.

The notion that all states have the responsibility to safeguard their populations against potential mass crimes is known as the Responsibility to Protect(R2P). The responsibility to protect is an international political commitment which was supported by all member states of the United Nations at the 2005 World Summit. The reasoning behind it was to prevent human rights atrocities like genocide, war crimes, ethnic cleansing, and crimes against humanity. (G.A. Res. 60/1, 2005 World Summit Outcome, (Oct. 24, 2005)

If states refuse or are unable to do so, the international community must step in to protect the vulnerable population. The duty was initially introduced in 2001, and it was founded on the idea of not only preventing but also reacting to crimes and rebuilding afterward. This principle could therefore also help to protect the rights of the LGBTQI community. The reality, however, is very different from the theory as it will be proved in the following chapters.

Former United Nations Secretary-General *Ban Ki-moon* has issued a strong request for all countries to resolve human rights violations against LGBTQ persons. He called the fight to safeguard LGBT rights "one of the most underappreciated challenges of our time." (UN,2013). The United Nations has started the "*Free and Equal*" ¹worldwide education campaign. In her 2011 speech, Hillary Clinton acknowledged that "homosexual rights are human rights, and human rights are LGBT rights." Most recently, the Human Rights Council voted in support of a UN special process establishing the office of an Independent Expert on Sexual Orientation and Gender Identity (SOGI) in 2016, following substantial debate (UNHCR,2016).

Despite these efforts, there is no international human rights convention or instrument that specifically states that individuals or groups should not be discriminated against or have their human rights violated because of sexual variety or gender identity. In the lack of specific mechanisms, legal and political campaigning is reliant on the application of existing human rights safeguards and the development of their scope through a variety of techniques. This process can be seen in the drafting of the Montreal Declaration and the Yogyakarta Principles by independent advocacy organizations in 2006.

Various UN fora have voted in favor of LGBT human rights initiatives, despite the strong cultural/ideological division on gender and sexuality. The Human Rights Council has requested reports from the United Nations High Commissioner for Human Rights on violations and discrimination against people based on their sexual orientation and gender identity on two occasions. (UNHCR,2016). Indeed, some countries have seen some encouraging advances throughout the years. However, today's situation is far from ideal, as violence, discrimination, abuse, and harassment can be found in many societies around the world.

1. Homosexuality in today's world

"If a same-sex couple...attempt to live a normal life, that is, go to restaurants, clubs, bars, theatre and make it obvious that they are a unit, they will sooner or later attract the adverse attention of the authorities... Their lives are lived at the level of furtiveness and fear brought about by the intolerance of the state." [Nezhadian v MIMA, No S396/2002 asylum case in the Federal Court of Australia]

As a result of a practice certain countries around the world aggressively sexualizes male-female interactions and has a clear stake in fostering and perpetuating toxic masculinity, certain countries regard homosexuality to be an "offense against society." As a result of the persecution imposed by criminalization statutes, lesbian, homosexual, bisexual, and transgender people in those countries must choose between living "discreetly" or seeking asylum in another country. Some individuals would have nowhere to go if neighboring countries criminalize homosexuality. Having a decent way of living

¹ Led by the UN Human Rights Office and launched in 2013, the UN Free & Equal campaign is an unprecedented global public information campaign aimed at promoting equal rights and fair treatment of LGBTI people. Its goal is to raise awareness about the human rights challenges LGBTI people face around the world. It aims to inspire people to take action through factsheets, infographics, videos and other multimedia content, spread through social and traditional media. UN Free & Equal campaign videos were seen by more than 14 million people in 2019 alone. Alongside the global campaign, UN Free & Equal organize national campaigns and events together with UN country teams around the world, with 17 full-scale national campaigns up and running, in 2020, and more being planned.

is undermined under these conditions and LGBT rights are being violated and the concept of living in a decent place is being turned upside down.

People should be able to choose how open they want to be with their social circle, friends, family or coworkers, about their sexuality. However, for many lesbian, gay, bisexual, and transgender people, living "discreetly" is not a choice but something necessary, it is more like a defensive response to the threat of persecution that they face as a result of their nonconformity to prevailing sexuality or gender norms. Furthermore, given local stereotypes, living as homosexuals or transgender is typically the polar opposite of "discretion."

When it comes to obtaining refuge, lesbians, gays, bisexuals, and transgender people encounter various obstacles. (Smith,2011). Those who flee their home countries because of persecution based on their sexuality or gender may be less likely to disclose their sexual orientation, gender identity or expression, or sexual conduct to immigration officials once they arrive in a new country because, based on their previous experiences, they distrust government agents, expect to be dismissed, and fear retaliation against their families.

Denials of asylum petitions based on sexual orientation or gender identity by refugee courts contradict a long-standing principle of implementation of the The 1951 Convention relating to the Status of Refugees and its 1967 Protocol.² Applicants who claim to be afraid of persecution because of their political or religious ideas are not required to keep such thoughts or opinions to themselves in the future. "An applicant need not demonstrate that all members of a specific social group are at risk of persecution in order to establish the existence of a particular social group," the UN High Commissioner for Refugees said. "It is not essential to show that all members of the political party or ethnic group have been singled out for persecution, as it is with the other reasons." People's rights to express their sexual orientation or gender identity should be protected using the same principles. (UNHCR, 2002)

"Where homosexuality is outlawed in a specific society, the application of strong criminal consequences for gay behavior could constitute to persecution, much as refusing to wear the veil by women in some countries," the UN High Commissioner for Refugees has warned³. Even if gay acts are not illegal, a claimant may have a valid claim if the state condones or tolerates discriminatory practices or damages directed against him or her, or if the state fails to protect the claimant effectively from such harm." (UNHCR, 2002)

At the last paragraph of the introductory chapter, the reason will be briefly analyzed I chose to engage and search the criminalization of LGBTQ+ community in today's world. People are frequently under pressure to live up to society's preconceived notions of what it means to be male or female. Those who don't match the mold may be criticized, intimidated, or even physically abused. Despite growing societal acceptance and more visibility in the media and public life, many LGBTQ+ people continue to face discrimination, harassment, and assault at work, school, and in social circumstances. (Beyond Blue, 2022)

² The 1951 Refugee Convention and its 1967 Protocol are the key legal documents that form the basis of our work. With 149 State parties to either or both, they define the term 'refugee' and outlines the rights of refugees, as well as the legal obligations of States to protect them. The core principle is non-refoulement, which asserts that a refugee should not be returned to a country where they face serious threats to their life or freedom. This is now considered a rule of customary international law. UNHCR serves as the 'guardian' of the 1951 Convention and its 1967 Protocol. According to the legislation, States are expected to cooperate with us in ensuring that the rights of refugees are respected and protected.

³ The UNHCR Handbook was prepared as a request of the Member States of the Executive Committee of the High Commissioner's Programme, including the United States, in order to provide guidance to governments in applying the terms of the Convention and Protocol. See Handbook, 1 para. IV.

Especially today, there is a very big difference between the societies that accept and embrace this community, and those that not only make distinctions but criminalize it. It seems to me terribly problematic that even today, both at a global level and at a European level, the non-acceptance of this community is a daily occurrence. It is heard often that the discrimination against the LGBTQ community exists in the workplace, educational and even in the health sector. A few months ago, when the pandemic was on the rise, IGLA and New York Times reports indicated that many people did not receive the appropriate care because of their sexuality or social identity. (Kramer,2021) The involvement with this issue was therefore to investigate which rules and which treaties or conventions protect this community, and which countries even today criminalize sexual acts between people of the same sex.

The aim of this postgraduate thesis is to clarify the global situation around the issue of criminalization of same-sex relations. An initial reference is made to the definitions of the terms '*criminalization*' and '*forced migration*' so the way they are used in the international context is clear. It then focuses on the global and European protection of the rights of these groups, through international conventions and commissions aimed at protecting these rights; like the UN Conventions and Committees and the European Convention and Court of Human Rights. An important part of the hypothesis is researching the situation that exists today globally. *In which countries are these relations still criminalized? What sanctions besides the death penalty are imposed? Which laws and where still exist?* Eventually, many people from these countries are forced to emigrate and try to find refuge in other more tolerant countries.

The research concludes by examining the legal systems of 4 different countries, which even today criminalize homosexual relationships and take retroactive steps in relation to their laws. These countries are Afghanistan, Brunei, Iran, and Uganda. They caught my attention during my research for different reasons each; *Afghanistan* due to the situation prevailing in the country up until the previous year, *Brunei* due to the 'New Sharia law against gay people' established in 2019, *Uganda* because of the changes in the Penal Code of the country and lastly *Iran*, which is the only country, along with Saudi Arabia, where executions for same-sex activity have reportedly taken place in 2020, based on IGLA reports. One can easily recognize that these states not only present punishable laws and rules for the LGBT community, but also follow regressive policies and ideologies in recent years. One thing can be taken for granted, these states have always had a traditional and more obsolete way of thinking and living, but in recent years there has been a regression on both a global and European level on issues concerning the rights of women or people belonging to the LGBT community. We can also take as an example the regressive efforts of the Hungarian government last year, aimed at restricting the freedoms of the community. (Rankin,2021)

Chapter 2

Paul Hunt, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, notes in his report to the 60th session of the Commission of Human Rights (Hunt and Health, 2022):

“...sexuality is a characteristic of all human beings. It is a fundamental aspect of an individual’s identity. It helps to define who a person is. The Special Rapporteur notes the abiding principles that have shaped international human rights law since 1945, including privacy, equality, and the integrity, autonomy, dignity, and well-being of the individual. ...In these circumstances, the Special Rapporteur has no doubt that the correct understanding of fundamental human rights principles, as well as existing human rights norms, leads ineluctably to the recognition of sexual rights as human rights. Sexual rights include the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interference.”

1. Definitions and terminology

The enduring ability of each person to feel intensely romantic, emotional, and/or physically attracted to other people includes a wide range of alternative sexual orientation expressions, including asexuality, bisexuality, pansexuality, heterosexuality, and bisexuality. The term “sexual orientation” is chosen for defining a person's feelings for or attraction to other individuals over sexual preference, sexual conduct, lifestyle, and way of life. (IOM, 2021) Research is being done on the connection between biology and sexual orientation. Despite the fact that scientists do not yet fully understand the root causes of sexual orientation, they hypothesize that a complex mixture of genetic, hormonal, and environmental factors is to blame. However, there is little evidence to support weak sexual orientation hypotheses, particularly for males. (Frankowski, 2004) (Stuart, 2014).

Is however, sexuality and sexual orientation a matter of biology or social environment? Most people have a heterosexual sexual orientation. (Balthazart, J., 2012.) A remarkable however percentage (3-8% or 5-10%) have a homosexual sexual orientation. Homosexuality is an issue whose research has always been overshadowed by prejudice and misunderstandings, e.g. that it is a disease / contagious disease / perversion / sin or attitude towards life that is chosen. The above reasons are currently being challenged or rejected, ie there is no psychoanalytic, psychological or sociological explanation for homosexuality. Recent research in biology and neuroscience to the sexual orientation to biological reasons, i.e. due to genetic, hormonal and possibly immune factors that act mainly during fetal life and in early childhood age - and not in indifferent parents or a troubled social environment. (Balthazart, J., 2012.).

Homosexuals are not responsible for their own situation. However, it is being investigated if and in to what extent the level of biological determination leaves some room for free choices. Therefore, neither homosexuals nor their parents have any responsibility for their sexual orientation and there is no objective reason for them to be rejected. They must have the right to live their lives according to their nature (biology) and not be haunted by remorse and guilt (Balthazart, J., 2012.). Balthazart at the

last chapter of his book *“The biology of homosexuality”* demonstrates that hormonal, genetic, and potentially immunological variables working in large part during embryonic life or early infancy have a significant influence in sexual orientation determination. It also claims that no psychoanalytic, psychological, or sociological explanation for homosexuality exists.

It is important to understand the differences between *sex, gender, sexuality, and sex activities*. **Sex** refers to a person's anatomical genitalia, which determines whether they are male or female. **Gender** refers to how one's social behavior is ordered according to masculine or feminine norms. **Sexuality** refers to one's awareness of sexual desire and expression of intimacy and pleasure, which encompasses not only one's "sexual orientation" (whether one desires sexual contact with someone of the same sex or with someone of the opposite sex) but also more subtle issues such as sexual desire intensity and focus. (Siegel and Etienne, 2014)

One of the most important aspects of sexuality is sexual orientation. Orientation refers to the type of individual who piques one's interest for sexual pleasure. **“Homosexual”** refers to someone who is attracted to people of the same gender. **“Heterosexual”** refers to someone who is attracted to people of the opposite gender. **“Bisexual”** refers to someone who is attracted to both genders, whereas **“asexual”** refers to someone who is not attracted to either. English phrases are acquiring international validity to characterize such persons in many modern nations. The term **“gay”** is used to describe a person who is a self-description for men who are solely gay in orientation, whereas lesbian is used for women who are solely homosexual in orientation. The phrases gay and lesbian relate to a self-aware connection with a subculture as well as a clinical psychological state (homosexuality). (Siegel and Etienne, 2014)

“LGBT stands for “lesbian, gay, bisexual and transgender”; “LGBTI” for “lesbian, gay, bisexual, transgender and intersex”. While these terms have increasing resonance, different cultures use different terms to describe people who have same-sex relationships or who exhibit non-binary gender identities (such as hijra, meti, lala, skesana, motsoalle, mithli, kuchu, kawein, travesty, muxé, fa’afafine, fakaleiti, hamjensgara and two-spirit).” (Free and Equal UN, 2014)

Sex, gender, and sexual orientation all identify key aspects of a person, but none of them address specific sex activities. One should never presume that a person who identifies as homosexual engages in certain sex practices -or any sex act at all-. Even if a homosexual woman never engages in sexual activities with someone of the same gender, her sexual orientation remains homosexual. (OHCHR, 2012). Similarly, a man may engage in sex acts with another man without being homosexual: the sex acts may be motivated by force or necessity rather than a desire for emotional fulfillment. Stereotyped connections of sex activities with particular types of people may not reflect those people's actual experiences. (Siegel and Etienne, 2014)

According to Anuradha (2007), homosexuality is a sexual orientation characterized by sexual attraction or romantic love only between persons who are of the same sex. Gay men, in particular, are referred to as 'gays,' whereas gay women are referred to as 'lesbians.' This activity has been frequently seen as abnormal, deviant, and/or an abomination by various communities; as a result, the development of a healthy homosexual identity is frequently impeded by current social attitudes against it (Berliner 1987; Cabaj, 1989; Loicano 1989). According to Baudh (2008), laws criminalizing same-sex relationships are referred to as gross indecency, depravity, and carnal intercourse against the natural order, but the legal measures are most generally referred to as sodomy laws. However, some nations, such as the Netherlands, Belgium, Canada, the United Kingdom, South Africa, and others, have recognized same-sex partnerships since the late 1990s and early 2000s (Anuradha 2007).

Most writers on homosexuality, however, seem to **experience definitional problems** (Hope, 2008), (Hart & Richardson, 1981). The initials LGBT collectively refer to lesbian, gay, bisexual, and transgender people. It is also mainly referred to LGBTI, initials standing for a lesbian, gay, bisexual, transgender, transsexual, or intersex person.

According to Amnesty International (Human rights and sexual orientation and gender identity - Amnesty International, 2022), sexual orientation refers to a person's sexual and emotional attraction to people of the same gender (homosexual orientation), another gender (heterosexual orientation), or both genders (bisexual orientation). The experience of self-expression in connection to social constructs of masculinity or femininity is referred to as gender identity (gender). With the physiological traits of the opposite sex, a person can have a male or female gender identity.

2. Homophobia an ongoing issue.

According to Kimmel/Aronson (2004), homophobia is traditionally characterized as the fear or loathing of homosexuals. However, this description does not capture the full scope of homophobia's impact. The phrase is difficult to define since its meaning extends beyond simple biases against gay people. Homosexuality has been viewed as a sin, psychopathology, a desire, and orientation over time (Barusch, 2009). Switzer (1996) mentions the lack of a universally accepted definition, but for the sake of his work, he defines it as "a sexual attraction, emotional attachment, and/or sexual encounters with someone of the same sex for a significant period of time in adult life."

Homosexuality is defined by Bell (1976), as stated in Ziebold/Mongeon (1982), as "simply the nature of a person's sexual object choice for another person of the same sex." He goes on to say that it is extremely diversified, having significant psychological, social, and sexual ramifications. A violation of the rule of law occurs when consensual same-sex relations are criminalized.

Criminalization, from a procedural standpoint, means that rights, only in relation to sexual orientation and family law, provided to all citizens under national constitutions, domestic laws, and international treaty responsibilities are being denied to the lesbian, homosexual, bisexual, and transgender (LGBT) community. Criminalization, from a substantive standpoint, is incompatible with the human rights that should be present in a well-functioning domestic system, and which are safeguarded by the rights-based international system. Criminalization will end when the Rule of Law is actually present. Criminalization is both a symptom of a Rule of Law failure and a sign that efforts to instill the Rule of Law to a meaningful degree have failed. The most important part of the Rule of Law is facing and tackling the criminalization of homosexuality in all its forms, promoting democracy, and preserving human rights and dignity.

3. Criminalization

Lesbians, gay men, bisexual persons, and transgender people (LGBT) are stigmatized by laws criminalizing homosexuality since their entire identity is outlawed. It is important to note that transgender people do not necessarily fall into the category of bisexuals or gay men. The use of "sodomy" laws to imprison (usually) men for private same-sex relations is considered by Amnesty International to be a grave violation of human rights, including the rights to privacy, freedom from discrimination, freedom of expression, and association, all of which are protected by the **Universal Declaration of Human Rights**, the **International Covenant on Civil and Political Rights**, and the **International Covenant on Economic, Social, and Cultural Rights**. People who have been jailed or

imprisoned purely because of their sexual orientation are included in Amnesty International's definition of prisoners of conscience.⁴

In the United States, for instance attitudes toward lesbian, gay, bisexual, and transgender (LGBT) people and challenges are significantly improving. (Rowe,2017) Equal treatment and opportunity are becoming more accessible. The idea that LGBT rights are universal is getting popular. While there is still more work to be done, the trend is finally positive. However, increasing respect for LGBT rights and acceptance of LGBT persons is still a work in progress. (Antonio Guterres, UN Secretary General, 2018).

Being gay is outlawed in far too many nations, with penalties ranging from fines to imprisonment and even death. Members of the LGBT community who simply claim their human rights and fundamental freedoms — rights guaranteed by international law – are faced with oppression, abuse, and ostracism in some nations. People who identify as LGBT become targets just because of who they are. In these countries and communities, they are treated in a disgusting and inhumane manner. The US government's stance on LGBT rights and treatment is clear. It is a violation of human rights when people are assaulted or killed because of their sexual orientation, or because they do not comply with cultural expectations about how men and women should look or behave, as Secretary of State Hillary Clinton stated in a December 2011 address in Geneva.(UN, 2011). The same goes for in the Member States of the Council of Europe (will be developed in chapter 5).

When governments make it unlawful to be homosexual or enable those who attack gay people to go unpunished, they are violating human rights. When lesbian or transgendered women are subjected to so-called corrective rape or forced hormone treatments, when people are murdered after public calls for violence against gays, or when they are forced to flee their countries and seek asylum in other countries to save their lives, it is a violation of human rights. And it is a violation of human rights when individuals are denied lifesaving care because they are homosexual, or when people are denied equal access to justice because they are gay, or when people are prohibited access to public spaces because they are gay. All people are entitled to human rights and dignity, regardless of appearance, origin, identity. (Jonathan Capehart, 2011)

Today in at least seventy-six countries, discriminatory legal guidelines criminalize private, consensual intercourse relationships, exposing hundreds of thousands of people to the hazard of arrest, prosecution, and imprisonment – and even, in at least 5 countries, the death penalty, based on IGLA international reports. The death penalty is the legally prescribed punishment for homosexuality-related offenses in Iran, Mauritania, Saudi Arabia, Sudan, Yemen, and may also be applied in regions of Somalia and Nigeria only by religious courts, according to IGLA. Criminalization of consensual intercourse behavior violates rights to privacy and to freedom from discrimination, both protected under international law, and places States in material breach of their obligation to protect the human rights of all people, regardless of sexual orientation or gender identity. (E. Nordberg, 2015)

These legal guidelines usually restrict several kinds of sexual intercourse or any intimacy or sexual activity. In certain occasions, the phrasing of the law is ambiguous and unclear, alluding, for instance, to "depravity," or to wrongdoings against "ethical quality" or "the request for nature." Some States explicitly condemn same-sex direct between men, while others prohibit both male and female same-sex relations. As a rule, these laws are a tradition of provincial rule: forced on the nations worried

⁴ Prisoners of conscience – someone has not used or advocated violence or hatred but is imprisoned because of who they are (sexual orientation, ethnic, national or social origin, language, birth, colour, sex or economic status) or what they believe (religious, political or other conscientiously held beliefs). Amnesty International.

during the nineteenth century. For instance, large numbers of the laws used to rebuff gay men in Africa and the Caribbean were indeed written in Victorian London.(Patrick R. 2013)

A shocking reality of African life has come to light: the continent looks to be one of the most homophobic regions on earth. A bill demanding life imprisonment (or, in some cases, death) for homosexual behavior was recently introduced in Uganda's parliament. Some analysts have noted a widespread trend towards tougher repression, and the changes in Uganda are not particularly unusual. (Patrick R.,2011)

Chapter 3

Global Protection of Human Rights

1. UN resolutions

States' legal obligations under the International Covenant on Civil and Political Rights (*adopted at 16 December 1966 by General Assembly resolution 2200A (XXI)*) is to protect and preserve the rights for all the citizens – which include sexual orientation. In places where this kind of laws are enforced, it may also lead to violations of the right to freedom from arrest and detention. (*UN General Assembly, 1966⁵*). Moreover, States that impose, even today the ultimate -death- penalty for consensual, adult same-sex relations do not respect the right to life enshrined in the Universal Declaration of Human Rights.

Proponents of criminalizing those relationships have attempted and failed to persuade the Human Rights Committee that criminalizing those relationships is a "reasonable" and "proportionate" approach to any threat to public health and welfare. The Committee has addressed and promoted the negative effects of criminalization on healthcare, especially HIV prevention and treatment, in their response. While different countries have different cultures and traditions, and public attitudes differ around the world, the importance placed on universality in international human rights law which necessitates all States to safeguard with any cost the rights of everyone, regardless of cultural and traditional differences or religious beliefs.

Before the UN General Assembly in 2008, a coalition of 66 countries published a declaration proclaiming their support for LGBT rights. In criticizing human rights breaches based on sexual orientation and gender identity, the declaration referred to the Universal Declaration of Human Rights. Russia, China, the Bush administration in the United States, the Holy See, and the Organization of the Islamic Conference all opposed it, with the latter issuing its own statement accusing the 66 countries of attempting to "undermine the international human rights framework by attempting to normalize pedophilia, among other acts." (Macfarquhar, 2008)

In 2011, a UN Human Rights Council report documented discrimination against LGBT people in both law and society, after the 2008 statement. It was revised in 2015 with a second UN Human Rights Council report on violence against LGBT people in relation to international law commitments. *Resolution 17/19*, the first United Nations resolution on human rights, sexual orientation, and gender identity, was adopted by the Council in June 2011. The resolution was narrowly accepted, but it gained significant support from Members of the council from all areas. Its acceptance set the path for the Office of the High Commissioner for Human Rights to produce the first official United Nations report on the issue. (Report of the United Nations High Commissioner for Human Rights, "Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity" (A/HRC/19/41).

⁵ *International Covenant on Civil and Political Rights*

Despite UN efforts to advance LGBT rights, countries opposed to such reform comprise a powerful faction with the ability to stymie or delay progress. Former Secretary General Ban Ki-Moon claimed in his final year in office that his support for LGBT rights often put him at conflict with powerful member states. Despite declaring LGBT rights to be an "institutional commitment," he saw his efforts as a failure. This is mirrored in the final edition of the Sustainable Development Goals, the United Nations' global development strategy, which left LGBT rights out entirely. "A bloc of countries, including Russia and much of Africa, the Middle East, Asia, and the Caribbean, as well as the Vatican and religious groups, have objected to calls for specific language safeguarding LGBT people," according to the report. (Lhant, 2019)

Nonetheless, a group of 12 UN agencies (ILO, OHCHR, UNAIDS Secretariat, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP, and WHO) released a statement on September 29, 2015, just four days after the adoption of the Sustainable Development Goals, declaring their intention to end violence and discrimination against the LGBT community. Ending Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender, and Intersex People, frames discrimination against LGBTI people as a violation of international human rights law and a roadblock to the Sustainable Development Goals. (Lhant, 2019)

It makes specific recommendations such as recognizing LGBTI status as a basis for asylum, repealing laws that criminalize people "based on their sexual orientation, gender identity, or gender expression," and "prohibiting discrimination against LGBTI adults, adolescents, and children in all contexts—including education, employment, healthcare, housing, social protection, criminal justice, and in asylum and detention settings." Several UN member nations retain the ability to sway UN resolutions against the inclusion of LGBT rights, although they have been unable to effectively stymie the reform efforts of those countries.

It is important to mention that political leaders are very reluctant to adopt laws concerning the protection of the rights of the LGBTIQI community. The principles voted for by the UN and other institutions are non-binding with the result that there is no big difference at international level. The above concerns a burning political issue which must be solved for the political scene to take active action in the defense of the community. However, many moves are made in an international and national level in order to protect and preserve the LGBT rights.

The **LGBTI Core Group**⁶, an informal assembly of countries and nongovernmental organizations (NGOs) devoted to addressing LGBT rights outside of established UN entities, represents LGBT rights at the UN. The Core Group, which was founded in 2008, backed both the General Assembly's 2008 declaration and the Human Rights Council's 2011 statement on LGBT rights, but was unable to obtain specific protections in the Sustainable Development Goals. Despite this setback, the Core Group has fostered cooperation between the Global North and the Global South, with representatives from both Western and Latin American countries, as well as Albania as the group's first Muslim-majority observer state.

In 2010, the Office of the High Commissioner for Human Rights became a member of the Core Group, with Charles Radcliffe, the High Commissioner's senior advisor, characterizing the Core Group's policy goal as follows:

"→ In the last ten years, the UN's political environment has shifted dramatically in terms of human rights, sexual orientation, and gender identity, thanks in part to the Core Group's efforts. This helps to provide the political space necessary for change, as well as making it simpler for the UN Human Rights

⁶ (Home - UN LGBTI CORE GROUP, n.d.)

Office and other UN agencies to increase their efforts to promote and preserve equal rights for LGBT people. The UN's formal institutions were having difficulty gaining universal support for LGBT rights due to objections from some member states. As an informal assembly, the LGBT Core Group seeks to overcome these obstacles by coordinating policies among countries and NGOs committed to making LGBT rights a human rights norm.” (Human Rights Council, 2010)

In 2016, the United Nations Human Rights Council appointed an independent expert to investigate worldwide violence and discrimination against LGBT people. *Protection against violence and discrimination based on sexual orientation and gender identity* (doc. no. A/72/172, 72nd session, United Nations General Assembly, 19 July 2017). The resolution was adopted with a close vote of 23 to 18 by several Western and Latin American countries in the LGBT Core Group. The LGBT Core Group's activity was formalized within official UN institutions with the appointment of an independent expert. Assessing, raising awareness of global discrimination based on sexual orientation or gender identity, working with states to implement anti-discrimination policies, and consulting states, NGOs, and UN agencies on issues of anti-LGBT violence were all part of the mission. (Lhant, 2019)

Laws criminalizing homosexuality encourage the dehumanization of lesbians, gay men, bisexual people, and transgender people (LGBT) as their very identity is criminalized. **Amnesty International** considers the use of “sodomy” laws to imprison (usually) men for same-sex relations in private as a grave violation of human rights, including the rights to privacy, freedom from discrimination, to freedom of expression and association, which are protected in the **Universal Declaration of Human Rights**⁷, the **International Covenant on Civil and Political Rights**⁸ and the **International Covenant on Economic, Social and Cultural Rights**⁹.

Chapter 5 highlights how far gay and lesbian issues have progressed in the European Union. Progress at the United Nations has been more challenging. Right-wing Catholics and fundamentalist Islamic states have forged a strong alliance to prevent LGBT rights from being recognized as a UN issue. (Rothschild 2000)

Attempts to put LGBT rights on the UN agenda and identify sexual orientation concerns as a UN issue have been confronted with stiff opposition. The United Nations has been unwilling or unable to acknowledge LGBT rights as human rights or to properly integrate LGBT concerns into its human rights activities. As we saw at the Fourth World Conference on Women in Beijing in 1995¹⁰, the words “sexual orientation” were not included in the final declaration, the Platform for Action.

⁷ The Universal Declaration of Human Rights is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected and it has been translated into over 500 languages. The UDHR is widely recognized as having inspired, and paved the way for, the adoption of more than seventy human rights treaties, applied today on a permanent basis at global and regional levels (all containing references to it in their preambles).

⁸ see below

⁹ Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

¹⁰ The Commission on the Status of Women has been responsible for organizing and following up the world conferences on women in Mexico (1975), Copenhagen (1980), Nairobi (1985) and Beijing (1995). Over the past decade, the Commission has systematically reviewed progress in the implementation of the twelve critical areas of concern identified in the Beijing Platform for Action at its annual sessions, and has adopted action-oriented recommendations, in the form of agreed conclusions, to facilitate increased implementation at all levels.

Technically, the sexual orientation question was eventually brought to the UN agenda when the Netherlands and Sweden convinced the EU to table this new language in February/March 1995, and Canada joined in. In practice, the subject was on the table when the Beijing Meeting's Main Committee debated it for hours on the last night of the conference. For many, the fact that it was considered at all was a huge achievement; for others, it was "a major success of the conference" (Rothschild 2000, p. 53). Politically, however, the decision to remove the bracketed sentences essentially put sexual orientation off the table.

The most important part of the protection of human rights is the international conventions and declarations ratified by international laws and protected by International Committees. The UN over the last few years have passed "*laws*" in order to promote the integrity of the LGBT community. Lesbian and gay rights have faced significant opposition at the United Nations (Swiebel 2009), but the UN Human Rights Committee ruled in 1994 that laws prohibiting same-sex sexual practices are violations of human rights and that human rights law prohibits discrimination based on sexual orientation.

- The United Nations has adopted in 1965 the **International Convention on the Elimination of All Forms of Racial Discrimination** which entered into force in 1968. The Convention, which was created to preserve third-generation human rights¹¹, commits its members to eliminate racial discrimination and promote inter-racial understanding.
- The **Yogyakarta Principles** (2007) are another attempt to prove that LGBT rights are human rights. They are an elaborate application of existing human rights law provisions to the issues of sexual orientation and gender identity, drafted by an expert group in November 2006 and first publicly launched in Geneva in March 2007.
- The United Nations General Assembly passed its first **non-binding resolution** in 2008, acknowledging that "*violence, harassment, discrimination, exclusion, stigmatization, and prejudice are directed against persons in all countries around the world because of sexual orientation or gender identity,*" and condemning "*violations of human rights and fundamental freedoms based on sexual orientation or gender identity.*" (Living Free and Equal, 2016). **The first Declaration on Human Rights, Sexual Orientation, and Gender Identity** was submitted to the United Nations General Assembly
- In 2011, the United Nations Human Rights Council passed **Resolution 17/19**, (RES/17/19 Human rights, sexual orientation and gender identity / RightDocs - Where human rights resolutions count, 2011) expressing "grave concern" about violence and discrimination based on sexual orientation and gender identity, and the UN Office for the High Commissioner for Human Rights issued its first report on LGBT people's human rights, describing "a pattern of human rights violations that demands a response" in every region of the world (UNHCHR 2011).

¹¹ Council of Europe; Solidarity Rights: In the case of the specific new category of rights that have been proposed as third generation rights, these have been the consequence of a deeper understanding of the different types of obstacles that may stand in the way of realising the first and second generation rights. The idea at the basis of the third generation of rights is that of solidarity; and the rights embrace collective rights of society or peoples, such as the right to sustainable development, to peace or to a healthy environment. In much of the world, conditions such as extreme poverty, war, ecological and natural disasters have meant that there has been only very limited progress in respect of human rights.

- It expresses grave concern about violence and discrimination against people because of their gender identity and sexual orientation, and the **Human Rights Council Resolution 32/2** for Protection against violence and discrimination based on sexual orientation and gender identity was adopted in June 2016. Individual nations are obligated under these international conventions to protect persons against homophobic and transphobic violence and torture, as well as brutal, inhumane, and degrading treatment.

In compliance with a resolution passed by the Human Rights Council in 2011, Ms. Navi Pillay, the UN High Commissioner for Human Rights released her report. The High Commissioner urged for the abolition of laws that make homosexuality illegal. The UN Human Rights Council also issued a Joint Statement on Ending Acts of Violence Based on Sexual Orientation and Gender Identity ¹²(the 2011 Human Rights Council Joint Statement), which was co-sponsored by 85 member states, and passed the first-ever positive vote on Human Rights, Sexual Identity, and Gender Identity in the UN (UN Human Rights Council, 2011, 17th sess.). It was passed by 23 countries, with 19 votes no and three abstaining, and it requested that the UN High Commissioner for Human Rights draft the first UN report on LGBT people.

Non-state actors — whether individuals, organisations, or extremist organizations – are the most common perpetrators of hate-motivated violence against LGBT persons. Nonetheless, failure by state authorities to investigate and punish this type of violence violates the obligation of states to protect everyone's right to life, liberty, and security of person, as guaranteed by articles 3 of the Universal Declaration of Human Rights and articles 6 and 9 of the International Covenant on Civil and Political Rights.

<p>Universal Declaration of Human Rights</p> <p>Article 3: Everyone has the right to life, liberty and the security of person.</p>
<p>International Covenant on Civil and Political Rights</p> <p>Article 6: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.</p> <p>Article 9: Everyone has the right to liberty and security of person.</p>
<p>Convention relating to the Status of Refugees</p> <p>Article 33(1) : No Contracting State shall expel or return (<i>refouler</i>) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.</p>

Under international law, states are obligated to protect civilians from torture and other forms of cruel, inhuman, or degrading treatment. This includes the need to ban torture and other types of ill-treatment, as well as the obligation to give remedy in the event of such actions. Failure to investigate

¹² On 29 September 2015, 12 UN entities (ILO, OHCHR, UNAIDS Secretariat, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP and WHO) released an unprecedented joint statement calling for an end to violence and discrimination against lesbian, gay, bisexual, transgender and intersex people. The statement is a powerful call to action to Governments to do more to tackle homophobic and transphobic violence and discrimination and abuses against intersex people, and an expression of the commitment on the part of UN entities to support Member States to do so.

and prosecute torturers is a violation of international human rights law in and of itself. Furthermore, forced anal examinations are in violation of the prohibition on inhumane or degrading treatment. Articles 5 of the Universal Declaration of Human Rights, 7 of the International Covenant on Civil and Political Rights, and 2 of the Convention Against Torture all provide these rights.

Universal Declaration of Human Rights

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

International Covenant on Civil and Political Rights

Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Convention against Torture

Article 1(1): For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 2(1): Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

Universal Declaration of Human Rights

Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.

International Covenant on Civil and Political Rights

Article 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 6(2): In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions

of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

Article 9: Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 17: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, a court case by the name '**Toonen VS Australia**', which was a landmark human rights complaint made before the United Nations Human Rights Council will be examined. The case eventually resulted in the abolition of Australia's final sodomy laws.

Nick Toonen¹³ was a gay Tasmanian living in a country where private consenting sex between adult men was still punishable by up to 21 years in prison. The rule was last applied in 1984, and civil rights campaigners were adamant about repealing it.¹⁴

The Human Rights Committee (HRC) agreed that the laws were an arbitrary violation of Mr. Toonen's right to privacy, and that removing them would be a good solution. It further concluded that paragraphs 2(1) and 26 of the Civil Rights Act prohibit discrimination based on "sex." In response to this landmark decision, Australia passed the Human Rights (Sexual Conduct) Act 1994 (Cth), effectively decriminalizing consenting sexual behavior between adults throughout the continent and prohibiting legislation that interferes with people's private sexual conduct. The Criminal Code of Tasmania was later updated to incorporate the Committee's recommendations.

The UN Human Rights Committee ruled in 1994 that domestic laws in the Australian state of Tasmania, which criminalized consensual same-sex sexual acts, "sexual intercourse... against the order of nature," and "gross indecency" between males under Sections 122(a) & (c) and 123 of Tasmania's Criminal Code, were in violation of international human rights law.

It violated the International Covenant on Civil and Political Rights' (ICCPR) rights to privacy (Article 17) and non-discrimination (Article 26), and, more importantly, it determined that the "continued existence" of these rules, despite their lack of implementation, violated Article 17.

The decision went on to state that "...reference to sex in articles 2, para. 1, and 26 [of the ICCPR] is to be taken as including sexual orientation," implying that any nation that has ratified the ICCPR must

¹³ Toonen v Australia (HRC, 1994)

¹⁴ Mr. Toonen was the first person to petition any of the UN human rights treaty bodies on Australia's behalf, sending his statement on the day the ICCPR-OP1 went into effect. He claimed that criminalizing private consensual sexual contact between men violated his right to privacy and that repealing the relevant articles of the Tasmanian Criminal Code would be the only viable remedy. Mr. Toonen's protest was met with a response from both the Commonwealth of Australia and the Tasmanian Government, with Australia acknowledging that homosexuality had been decriminalized in all other Australian jurisdictions. On the other side, the Tasmanian government supported its legislation on the grounds of public health and morals. Mr. Toonen believes he lost his job as a result of the humiliation he caused the Tasmanian government: if he did not leave, the government threatened to withhold funding to his employer, the Tasmanian AIDS Council.

ensure equal treatment under the law regardless of a person's appearance, sexuality or other feature and prohibit discrimination based on sexual orientation.

Based on the United Nations Human Rights Committee's judgement in Toonen, the Australian federal government passed the Human Rights (Sexual Conduct) Act 1994 to overrule Tasmania's breaching statute. Tasmania filed an appeal in the High Court of Australia, but it was denied, and the anti-sodomy law was subsequently repealed.

Chapter 4

1. The Link between Same-sex relations, Refugees and Forced Migration

“We should perhaps remind ourselves that exclusion and discrimination on the basis of sexuality is a ground for refugee status under the 1951 Refugee Convention.” Moses Chrispus Okello (Kaduuli,2019)

Many people all over the world due to their sexual orientation are forced to leave their houses and their cities due to a fear of being persecuted (IOM glossary on migration) a migratory movement which, although the drivers can be diverse, involves force, compulsion, or coercion. (Sironi, Emmanuel, and Bauloz, 2016)

This phrase has been used to characterize the motions of refugees, the displaced persons (including those displaced by disasters or development activities in their home nation), and, in some cases, victims of trafficking. (Sironi, Emmanuel, and Bauloz, 2016). The use of this phrase is being disputed at the international level due to broad acknowledgment that there is a continuum of agency rather than a difference between forced and voluntary in these movements, and that it may weaken the existing legal international protection structure.

Many people who seek asylum because of the fear of being persecuted due to their sexual orientation confront significant challenges in the countries where they seek refuge. If their sexual orientation is revealed in some asylum-seeking nations, they risk facing the same or similar persecution they fled. Their asylum requests are frequently dismissed mistakenly in other nations. Decision-makers argue that in circumstances where they have not previously stated their sexual orientation openly, they should be entitled to keep their sexual orientation hidden from authorities and private individuals from whom they might otherwise be at risk. This understanding of whether or not someone has a well-founded fear of persecution runs counter to a long-standing principle of interpretation of the 1951 Refugee Convention. If someone claims a well-founded fear of persecution as a result of their political or religious convictions, they are not obligated to stop expressing those beliefs in the future. People's rights to express their sexual orientation should be protected on the same basis. (Human Rights First, 2010).

Internal displacement, human rights problems such as sexual orientation, environmental, economic, and development-based displacement, and people smuggling and trafficking have all been topics of discussion in the subject of refugee and migration studies.

Homophobia and forced migration engage in two different ways. The first is when homosexual migrants are accepted into a homophobic society, and the second is when homosexuals are forced to escape a country because they are terrified for their lives in a homophobic context. Laws criminalizing homosexuality further dehumanize LGBT people by making their entire personal existence a crime. UNHCR notes that LGBTI refugees are sensitive to potential oppression as they flee to host states that either criminalize same-sex conduct or have prevalent discriminatory norms, forcing LGBTI refugees to remain hidden or fear revealing their sexual preference or gender identity as part of their asylum

application process (Human Rights First, 2010). Homophobia is pervasive in today's society, endangering homosexuals, especially lesbians and bisexual women. People from the global South seeking refugee status on the basis that they are being persecuted because of their sexual orientation should be expected in the global North.

States also have a responsibility to give safe haven to people who are being persecuted because of their sexual orientation or gender identity. According to **Article 33 of the Refugee Status Convention**, States Parties are obligated not to deport or return a refugee to a location where their lives or dignity would be affected because of race, religion, nationality, membership in a specific social group, or political opinion. Individuals who fear persecution because of their sexual orientation or gender identity, according to the United Nations High Commissioner for Refugees (UNHCR), may be deemed members of a "particular social group." State parties to the Convention should guarantee that such people are not repatriated to a country where their lives or freedom would be jeopardized, and should accept them as refugees to be treated in accordance with the Convention's provisions if they meet the criteria for refugee status. (UNHCR, Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity (see footnote 1), para. 3; see also UNHCR in relation to *Secretary of State for the Home Department v. Patrick Kwame Otchere*, 1988.)

The UNHCR's Position on Asylum Requests Based on Sexual Orientation and/or Gender Identity Using international law to support LGBTI asylum claims. (UNHCR's Views on Asylum Claims Based on Sexual Orientation and/or Gender Identity, 2016). In recent years, the United Nations High Commissioner for Refugees (UNHCR) has issued a number of interpretive instruments that recognize the special needs of lesbian, gay, bisexual, transgender, and intersex (LGBTI) individuals. Those decisions describe UNHCR's position on LGBTI claims, as well as the obstacles that may arise because of such claims, and how to apply those views in assisting asylum seekers.

"Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country; or who, not having a nationality, and being outside the country of his former abode," according to Article 1(A)(2) of the Convention and Article 1 of the Protocol.

a. One of the most important questions raised by LGBTI people's refugee applications is whether the terror they have experienced qualifies as persecution. A threat to life or liberty, or other significant human rights violation, on one of the five grounds listed in the 1951 Convention/1967 Protocol, always amounts to persecution, according to the Handbook. Individuals who can demonstrate that they have been subjected to, or have reason to fear, substantial violations of their human rights as a result of their sexual orientation or gender identity are being persecuted. Furthermore, an asylum seeker may have been subjected to a variety of measures that, while not constituting persecution in and of themselves, "when taken together, produce an effect on the applicant's mind that can reasonably justify a claim to a well-founded fear of persecution on 'cumulative grounds.' (Handbook at para. 51.).

2. Protection of LGBTQ individuals experiencing forced migration at the global level

A state may not remove, expel, or extradite a person to any country where that person faces a well-founded fear of torture, persecution, or any other form of cruel, inhuman, or degrading treatment or punishment on the basis of sexual orientation or gender identity, according to international protection guidelines. (UNHCR 2012).

The **non-refoulement principle**¹⁵, which is the backbone of the refugee regime for examining claims to refugee status under the 1951 Convention and its 1967 Protocol relating to the Status of Refugees, has this meaning and content. A number of major **legal instruments** and **human rights frameworks** are in place on an international level to protect LGBTQ individuals facing or experiencing forced migration, including the following:

- **The 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees**¹⁶;

The 1951 Refugee Convention and its 1967 Protocol are the foundational legal documents that define the word "refugee" and establish the rights of refugees, as well as the legal responsibility of States to protect them. The core concept is non-refoulement, which states that a refugee shall not be sent back to a nation where their life or freedom is in grave danger. This is currently regarded as a rule of international customary law. The United Nations High Commissioner for Refugees (UNHCR)¹⁷ is the 'custodian' of the 1951 Convention and its 1967 Protocol. States are expected to work with us to ensure that the rights of refugees are respected and protected, according to the law.

- **The 1966 International Covenant on Civil and Political Rights Articles 2, 6, and 26, which include sex and sexual orientation;**

Recognition of the inherent dignity and equal and inalienable rights of all members of the human family is the foundation of universal freedom, justice, and peace, according to the principles expressed in the United Nations Charter. These rights are also derived from the fundamental dignity of the human being, which must be respected.

¹⁵ It prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, illtreatment or other serious human rights violations.

¹⁶ Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees UNHCR issues these Guidelines pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol.

¹⁷ UNHCR has adopted the following definitions: "A lesbian is a woman whose enduring physical, romantic, and/or emotional attraction is to other women. Gay is often used to describe a man whose enduring physical, romantic, and/or emotional attraction is to other men, although the term can be used to describe both gay men and lesbians. Bisexual describes an individual who is physically, romantically, and/or emotionally attracted to both men and women. Transgender describes people whose gender identity and/or gender expression differs from the sex they were assigned at birth. The term intersex covers bodily variations with regard to culturally established standards of maleness and femaleness, including variations at the level of chromosomes, gonads, and genitals." See UNHCR, Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees (2015).

- **The 1984 Convention on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;**

The United Nations General Assembly adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") on December 10, 1984 (resolution 39/46).

- **The 2007 Yogyakarta Principles.**

A distinguished group of international human rights experts convened in Yogyakarta, Indonesia in 2006 to define a set of international principles relating to sexual orientation and gender identity in response to well-documented patterns of abuse. The Yogyakarta Principles are a universal guide to human rights that affirms binding international legal principles that all states must adhere to. They envision a world in which all persons born free and equal in dignity and rights are able to exercise their unique birthright. The Yogyakarta Principles, in particular, establish a set of human rights principles that allow people to seek and get refuge in other countries if they are persecuted because of their sexual orientation or gender identity. The Yogyakarta Principles are directly related to human rights in the areas of sexual orientation and gender identity and are designed to use international human rights legislation to remedy violations of LGBT people's human rights.

The ***Rights to Equality and Non-Discrimination*** are addressed in Principle 2. Take steps to address discriminatory attitudes and practices in the application of prenatal therapies and genetic modification technologies based on sex, gender, sexual orientation, gender identity, gender expression, and sex characteristics.

The ***Right to Seek Asylum*** is covered under Principle 23. Ensure that a well-founded fear of persecution on the basis of sexual orientation, gender identity, gender expression, or sex characteristics is accepted as a basis for refugee status recognition, including where sexual orientation, gender identity, gender expression, or sex characteristics are criminalized and such laws, directly or indirectly, create or contribute to an oppressive environment of intolerance, discrimination, and violence; Ensure that those seeking asylum are safe from assault, discrimination, and other harm based on their sexual orientation, gender identity, gender expression, or sex characteristics, including during the assessment of their claims and while in detention;

The ***Right to privacy*** is addressed in Principle 6. Ensure that requests for information on a person's sex or gender are relevant, reasonable, and necessary as required by law for a legitimate purpose in the circumstances in which it is sought and that such requests respect everyone's right to gender self-determination.

Chapter 5

1. Human Rights Protection in the context of the European institutions

The sovereignty of nation-states over law and policy has been eroding as supranational institutions of governance have grown in prominence in post-World War II Europe, and human rights discourse has emerged as "the meta-law of national legal systems" (Pylkkanen 2007). Transnational organizations have had a crucial impact in the evolving landscape of heteronormativity in Europe in this context.

The subject of gay and lesbian rights first came to the attention of the European Union in the early 1980s, when the European Parliament adopted the **Sgarcialupi Report**¹⁸ (European Parliament 1984) after much debate. The European Commission was invited to submit ideas in this report to address workplace discrimination against gay people.

Since the early 1980s, both the Council of Europe (CoE) and the European Union (EU) have taken normative views on same-sex sexualities, promoting a human rights-based equality agenda that has been extending in breadth within the constraints of their changing legal competencies. The Convention for the Protection of Human Rights and Fundamental Freedoms binds all members of the Council of Europe. While the Convention makes no clear reference to homosexuality, a series of landmark decisions and judgments by the European Court of Justice has contributed to the reshaping of the regulation of same-sex relations since 1980. (Kollman 2007).

ECHR judgments contribute to the transnational normative order of sexuality. These judgments are legally binding in member states and have been crucial in some third countries. Furthermore, since acknowledging in 1981 that homosexuals "continue to face discrimination and, at times, oppression," the Council of Europe has passed numerous non-binding recommendations and resolutions on a variety of forms of discrimination against lesbians and gay men, including in relation to residence and immigration, freedom of expression, and parenting rights, and has advocated for "a broad interpretation of the concept of family" to include "nonmarriage" (Recommendation 1686, 2004).

In this approach, the LGBT movement was able to acquire access to at least two EU institutions in the early 1990s: the European Parliament and the European Commission, however, in order to completely place homosexual and lesbian rights on the agenda, the issue of a legal basis on which to act had to be addressed. Fighting discrimination based on sexual orientation fell even beyond the Community's jurisdiction, thus it was necessary to reform the treaties (Bell 2002).

The legal framework and policy initiatives in the frame of the European Union should also be analyzed. It should be mentioned here as an introductory note that the following information is relevant in particular the EU Member States (27) and the Council of Europe (47), as well as action of these two European institutions on the subject of the dissertation.

The Council of Europe adopted a Written Declaration on "**gay rights in new democracies**" in 1993, stating that former Communist nations needed to address the rights of homosexual individuals not to

¹⁸ A thorough report and set of recommendations aimed at ensuring equal rights for homosexuals in all European Union member states.

be discriminated against. (Roseneil, 2012). A few years later, in 2008, the new normative regime of "tolerance and non-discrimination" in relation to same-sex sexualities published a forceful statement:

"The Committee of Ministers recalls that it is strongly attached to the principle of equal rights and dignity of all human beings, including lesbian, gay, bisexual, and transgender persons. The Council of Europe's message of tolerance and non-discrimination applies to all European societies, and discrimination on grounds of sexual orientation or gender identity is not compatible with this message. It notes that instances of discrimination on grounds of sexual orientation or gender identity as well as homophobia and intolerance towards transgender persons are regrettably still widespread in Europe" (Committee of Ministers, 2008, 1031st Meeting, item 4.3c), (Roseneil, 2012).

Social policy was generally outside the EU's original mandate, but since the mid-1980s, when the concept of the "European Social Model"¹⁹ was born, the "social dimension" has grown in importance. The 1992 Maastricht Treaty incorporated "**justice and home affairs**" into the EU's concerns, and the promotion of "social cohesion" and the fight against social exclusion has become more central as part of the political project of creating European citizenship and constructing a shared set of European values (Shore 2004).

The Treaty of Amsterdam, signed in 1997, was a watershed moment in EU social policy, providing a new anti-discrimination agenda as well as a new "soft law" framework. Changing Landscapes of Heteronormativity is an "open approach of coordination" that aims to bring the EU and member state policy closer together through benchmarking, recommendations, and the exchange of best practices, in addition to "hard law" regulation that is binding all member states. (Bell 1998)

The European Union's point to combat discrimination based on "sexual orientation" was established by **Article 13 of the Treaty of Amsterdam**, which was a legal movement. The **Squarcialupi Report** of 1984 (Clews, 2013), which addressed sexual orientation discrimination in the workplace and resulted in a non-binding European Parliament resolution condemning "all forms of discrimination based on an individual's sexual tendencies" (Bell 1998), and the **Roth Report** of 1994, which proposed action on discrimination against lesbians and gay men and raised the issue of same-sex marriage and parenting rights, laid the groundwork for this. (Swiebel 2007).

The Treaty of Amsterdam legitimized an **anti-discrimination policy agenda**, which was translated into a legally binding directive (the Employment Equality Directive) in 2000, (Press corner, 2008) forbidding discrimination in employment on the basis of *religion, belief, age, or sexual orientation*. This was the first piece of EU legislation to address the issue of same-gender sexuality. The Directive suggests that the principle of equal treatment between men and women is "well established" within Community law and that the Community should aim "to eliminate inequalities, especially since women are often the victims of multiple discrimination," referring to the EU's founding principles of "liberty, democracy, respect for human rights and fundamental freedoms" (Council Directive 2000/78/EC: para. 1).

¹⁹ National welfare states are legally and economically constrained by European rules of economic integration, liberalization and competition law, whereas efforts to adopt European social policies are politically impeded by the diversity of national welfare states, differing not only in levels of economic development and hence in their ability to pay for social transfers and services but, even more significantly, in their normative aspirations and institutional structures.

The next stage was to designate "**equality before the law and protection against discrimination**" as a universal right, as defined by the United Nations' Universal Declaration of Human Rights and other UN Conventions and Covenants. After that, the EC goals related to the creation of a European strategy to produce "a skilled, trained, and adaptable workforce" (Council Directive 2000/78/EC: para. 7) are mentioned. Discrimination is condemned because it "threatens the attainment of the EC Treaty's principles, in particular achieving a high level of employment and social protection, enhancing the standard of living and quality of life, economic and social cohesion and solidarity, and free movement of persons." (Paragraph 1 of Council Directive 2000/78/EC) Eu charter of human rights

The EU Charter of Fundamental Rights, a nonbinding but rhetorically *and politically significant statement concerning the meaning and scope of human rights inside the Union, was also approved in 2000. "Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership in a national minority, property, birth, disability, age, or sexual orientation shall be prohibited," according to Article 21 of the Equality chapter.*

It is therefore understood that in the European continent at least, the efforts of the European Community to recognize the rights of all began around the 2000. Since then, as is natural, there have been even more attempts to recognize the LGBTQ community and not distinguish it from the rest of the civil society.

Following that, a five-year 100 million euro "*Community Action Programme to Combat Discrimination*" (2001–6) was launched, which included sexual orientation. The Charter was made legally binding on member states by the Lisbon Treaty of 2007, and the European Agency for Fundamental Rights was founded as a crucial component of its agenda. The European Commission's "renewed social agenda" launched in 2008 involves addressing discrimination on the basis of sexual orientation outside of the workplace, effectively eliminating the "equality hierarchy," which protects against sex/gender and racial discrimination in a broader variety of areas (Swiebel 2009). The political activism of the transnational LGBT movement, as well as the moral pressure exerted by human rights NGOs such as Amnesty International, Human Rights Watch, and the International Gay and Lesbian Human Rights Commission, have accompanied and influenced these changes in European law and policy.

The European branch of the International Lesbian and Gay Association (**ILGA-Europe**) began to receive funding from the European Commission in the early 1990s, and it took advantage of the political opportunity provided by the establishment of the Social Platform in 1995 to become a key player in the EU's civil dialogue, as well as obtaining consultative status in the Council of Europe. The LGBT community successfully lobbied for the Charter's sexual orientation clauses, and gay activists acting as assistants in parliamentary groups and supportive bureaucrats within the Commission were also vital. (Swiebel 2009).

2. The work of the Council of Europe

The European Court of Human Rights (ECtHR) is a body of the Council of Europe that was established in 1959. It hears cases involving individual or state-level violations of human and civil rights, as defined by the European Convention on Human Rights. In other words, its job is to monitor and interpret the European Convention on Human Rights (ECHR) through its judicial rulings. After exhausting all legal remedies within his country, every individual has the option of using it. The European Court of Human Rights (ECHR) is a body of the Council of Europe that handles matters under the European Convention on Human Rights (ECHR). Its judgments are so binding on states that many states and governments have amended their legislation to align with the ECtHR's decisions. (European Court of HR, 2018)

The European Convention on Human Rights was signed on November 4, 1950, in Rome, and became effective on September 3, 1953. Respect for human life, freedom of opinion, thought, and expression, respect for the family and private life, the right to the free development of personality, conscience, religious freedom, respect for property, the prohibition of torture and degrading treatment of people, the abolition of slavery, the elimination of racism and discrimination, and the guarantee of telecommunications are among the individual and social rights addressed in this Convention.

The European Court of Human Rights emphasizes that its aim is to make a significant contribution to minimum level of protection of human rights in all Council of Europe Member States. To this end, consider, in particular on issues related to sexual orientation and gender identity where national legal frameworks and national practices often differ greatly, whether there is a tendency of convergence between Member States on an issue, i.e., a European consensus has been formed. Otherwise, when the diversity of national legislation and the gap between different legislative trends do not yet allow to diagnose the existence of such a consensus, it usually rejects it. (CoE (July 2009). Commissioner for Human Rights, Human Rights and Gender Identity, Issue Paper, Council of Europe Publishing.)

However, the negative image established at the world level for a country that, in the judgment of the ECtHR, violates the Convention on Human Rights, causes a slew of issues, forcing states to amend their legislation to be entirely in line with the ECtHR's judicial judgments.

The way the ECtHR interprets, analyzes, and defines human rights through its judicial decisions is crucial to the relationship between the ECtHR – Convention on Human Rights – Societies of States (case law). The European Court of Human Rights believes that the Convention (ECHR) is a "living instrument" that must be read in light of contemporary circumstances and the needs of the societies of the Council of Europe's contracting countries. This is critical because, depending on society's perceptions, the interpretation of rights, and the analysis and definition of concepts provided by the ECtHR, the States must eventually embrace the notions, despite sanctions and worldwide uproar, as now defined by the ECtHR. (Council Of Europe, 2022). In simpler terms, if a concept such as marriage or family, slavery, work, freedom of speech, and so on was previously accepted by human societies, even in a broad but stable framework, but the ECtHR has recently given new definitions through its judicial decisions, the Nation States are obligated to follow the new definitions of the concepts to the point where they change even their legislation. In other words, it transforms the ECtHR into a legislative body that lacks constitutional protection and exceeds its authority by creating new rights. Then, as is natural, the social-collective consciousness and mentality are established through each state's legislation. As a result, if the conceptions change, the manners and customs alter as well.

The Member States are bound by the ECtHR's verdicts against them and are required to carry them out. In fact, the Council of Europe's Committee of Ministers oversees their implementation. In many situations, a state that has been found guilty of violating the European Convention on Human Rights will be required to alter its legislation to bring it into compliance with the Convention. The ECtHR may,

by a court ruling, infer a right from the ECHR's contractual language that did not exist from the start, using an appropriate interpretation. (Council Of Europe, 2022)

3. Cases before the European Court of Human Rights which affect the LGBTQ community

In 1981, a recommendation was adopted by the Parliamentary Assembly of the Council of Europe , and, the same year, a judgment was issued by the European Court of Human Rights, condemning the criminalization of consensual same-sex acts:

1. The **Parliamentary Assembly's Recommendation 924** ²⁰ on discrimination against homosexuals called for the decriminalization of (homosexual acts) between consenting adults in private, as well as the implementation of the same minimum age of consent for same-sex and heterosexual acts.
2. The European Court of Human Rights handed down its important judgment in **Dudgeon v United Kingdom (1981)**, stating that Northern Ireland's legislation criminalizing same-sex conduct between consenting adults was a violation of the European Convention on Human Rights' right to privacy (ECHR).

This was the first case in the world to promote the subject of criminalization and succeed under human rights law, and it served as the foundation for successful litigation in the Republic of Ireland (1988) and Cyprus (1993). Northern Ireland legalized male same-sex activity the following year. It also had a greater impact because the ECHR's decriminalization principle became an express condition for prospective countries to agree to before being invited to the Council of Europe, and several states abolished these laws before joining. (Cases before the European Court of Human Rights | ILGA-Europe, 2020). The judgement was also utilized in *Toonen v Australia*, a UN Human Rights Committee case that resulted in the removal of Australia's final sodomy legislation.

The Council of Europe established decriminalization as an essential condition to apply to all member nations as an indication of the growing relevance and authority of international institutions, and in light of the *Dudgeon v United Kingdom* ruling. Although the condition existed in the early 1980s, its effects were felt most strongly in the 1990s, following the disintegration of the former Yugoslavia and the collapse of the Soviet Union, as most candidate states from Eastern Europe and the former Soviet bloc decriminalized prior to joining the EU.

The European Court of Human Rights found that *Modinos v. Cyprus* was the third successful case of its kind after *Dudgeon v. the United Kingdom* and *Norris v. Ireland*, which found that the punishment of "carnal knowledge... against the order of nature" under Section 171 of Cyprus's 1959 Criminal Code violated the right to privacy under Article 8 of the European Convention on Human Rights. (Cases before the European Court of Human Rights | ILGA-Europe, 2020)

As a result of pressure from an impending case, *H. v. Turkey*, at the European Court of Human Rights, which was supported by the Human Dignity Trust, the Parliament passed legislation repealing laws

²⁰ (Recommendation 924 (1981) on discrimination against homosexuals, 1981)

criminalizing consensual same-sex sexual conduct between consenting adults, making it the last jurisdiction in Europe to do so. This may have been the fourth case taken to the European Court of Human Rights which challenged the criminalization of same-sex relations and expressions based on a violation of the right to privacy under Article 8 of the European Convention on Human Rights if the case had gone further.

4. How is the legal situation today in Europe?

Decriminalization and equality of the legislation around same-sex sexual behavior could be considered as the first step toward the arrival of a new European norm of "homotolerance" (Rthing 2008), which is now more or less institutionalized inside various European countries. The legalization of gay behavior initiated a profound transformation in gender norms. This has included the fight for and accomplishment of official constitutional protection for lesbians and gay men against discrimination and violence, as well as the prospect of recognition for their marriage and parental relationships, which could be described as legal "homonormalization."

If we wanted to see the evolution of gay rights in Europe, we would say that the **rainbow flag** was adopted in the 1980s²¹, as was the LGBT abbreviation, the professionalization of gay and lesbian militancy, and the election of openly homosexual candidates. In the 1981 parliamentary election in France, Maurice Cherdron ran unsuccessfully for the Collectif homosexuel de l'Ouest parisien [Gay Collective of Western Paris], whereas in Germany, Albert Eckert (born 1960) was elected to the Alternative slate in 1989. Because of the terrible effects of the HIV/AIDS epidemic, groups were focused on making people more aware and combat the disease (Terrence Higgins Trust in the United Kingdom in 1982, Deutsche Aids Hilfe in 1983, France Aides in 1984, and Act Up in 1989). In 1989, the European Parliament began pressing its member states to decriminalize gay relationships and recognize same-sex unions in response to this agitation. In 1993, the World Health Organization eliminated homosexuality from its list of mental illnesses. As the new abbreviation LGBTQI illustrates, there has been a convergence in the struggle led by homosexual people, which has progressively been supported by trans and intersex movements. The Association Beaumont Continental (ABC, 1975) fought pathologizing of transgender people and won in France in 2010. Gender assignment and genital mutilation should be abolished, according to the OII (Organization Intersex International), which opposes sexual bicategorization. (Schlagdenhauffen, 2020)

In the early twenty-first century, member states became increasingly responsive to the demands of the LGBTQI movement, in conformity with the European Charter of Fundamental Rights. The charter forbids prejudice against different sexual orientation and protects transgender people from discrimination based on "gender," according to the reasoning of the European Union's Court of Justice. Outside of the European Community, demands are not as loud or are even suppressed, as seen by Russian legislation forbidding "gay propaganda" since 2013, or the persecution of homosexuals in Chechnya, which was condemned by a number of European chancelleries in 2017. (European LGBTQI movements and gay rights, 2020)

²¹ The rainbow flag represents lesbian, gay, bisexual, transgender, and queer (LGBT) and queer pride, as well as LGBT social movements. The colors of the LGBT pride flag, also known as the gay pride flag or LGBT pride flag, show the diversity of the LGBT community as well as the range of human sexuality and gender. The use of a rainbow flag as a sign of homosexual pride began in San Francisco and has since spread to LGBT rights gatherings all around the world.

Two World Wars, authoritarian regimes, fascism, xenophobia, and racism in Europe serve as a backdrop to a project of European identity and citizenship construction that discursively prioritizes equality and human rights, with sexual orientation now firmly on the agenda. When they adopt their own modes of regulation, discipline, exclusion, and hierarchization, however, huge issues arise in terms of the politics of this new homotolerance standard and homonormalization processes.

Moving forward, the way that all these pertinent legislations were drafted, as well as where their ideological starting point is founded, would be discussed. Any member State of the European institutions is subjected to the influences and interactions that arise inside its framework and from its formal legal institutions, and it is positioned accordingly.

I. Historical context

Various political regimes in the twentieth century were anti-homosexual. After regaining independence after World War I, Poland became the second country in 20th-century Europe to decriminalize homosexual activity in 1932 (following the Soviet Union, which decriminalized it in 1917 under the Russian Soviet Federative Socialist Republic but recriminalized it in 1933 under Stalin), followed by Denmark in 1933, Iceland in 1940, Switzerland in 1942, and Sweden in 1944. (Buyantueva, R. & Shevtsova M, 2020).

Paragraph 175 of the German penal code (1935), which prohibited homosexuality, was repealed by the German Democratic Republic in 1956. Following Kurt Freund's scientific studies, which included phallometry of gay men who looked to have given up sexual contact with other men and established straight marriages, homosexual behavior was decriminalized in Czechoslovakia in 1962. Freund came to the opinion that one's gay orientation is irreversible. (Nathan Ha, 2015). The claim that phallometry on men was the sole reason for the decriminalization of homosexual behavior in Czechoslovakia is contradicted by the fact that it also applied to women because the notion of a male-specific fixity of sexual orientation as an argument for gay rights combined with the notion of female sexual plasticity is anti-lesbian rights.

Sweden was the first country in the world to pass legislation allowing transgender people to have their sex changed medically and to give free hormone replacement therapy. (Hanna Jedvik,2007)

In 1979, a number of people in Sweden called in sick with a case of homosexuality, protesting the classification of homosexuality as a disease. The main office of the National Board of Health and Welfare was then occupied by activists. Within a few months, Sweden became the first country in Europe to declare homosexuality no longer to be a disease. (Hanna Jedvik,2007)

Denmark was the first country in Europe, and maybe in the world, to establish registered partnerships for same-sex couples in 1989. Bulgaria was the first European country to outlaw same-sex marriage in 1991. Thirteen countries have now followed suit (Lithuania in 1992, Belarus and Moldova in 1994, Ukraine in 1996, Poland in 1997, Latvia and Serbia in 2006, Montenegro in 2007, Hungary in 2012, Croatia in 2013, Slovakia in 2014, Armenia in 2015 and Georgia in 2018). (Gillet,2018)

The Netherlands took the next step in 2001 when it became the first country in the world to allow same-sex couples to marry civilly. Eighteen more European countries have since followed suit (Belgium in 2003, Spain in 2005, Norway and Sweden in 2009, Portugal and Iceland in 2010, Denmark in 2012, France in 2013, England and Wales in 2013, Scotland in 2014, Luxembourg and Ireland in 2015, Finland, Malta, and Germany in 2017, Austria in 2019 and Northern Ireland in 2020, and Switzerland approved a referendum in 2021, which will take effect 1 July 2022). (Gillet,2018)

Following the decriminalization of homosexuality in occupied northern Cyprus (2014), an area of the Republic of Cyprus which is under military occupation by Turkey since 1974, Europe became the first continent in which homosexuality is lawful. This is not to say that homophobia and persecution of LGBTI people do not exist in European countries. The UN Human Rights Committee determined that Russia's legislation forbidding LGBT 'propaganda' to minors breached the ICCPR's freedom of expression and non-discrimination sections in the case of Fedotova v Russian Federation in 2012. Violence against LGBTI individuals is also reported on a regular basis in other parts of Europe. The issue involves the petitioners, three same-sex couples, being denied the option to have their relationships properly registered, which they believe amounts to discrimination based on their sexual orientation. (Reuters, 2014.)

As a result, decriminalizing homosexuality does not always imply that LGBTI people's human rights are being promoted and protected. Decriminalization, on the other hand, is the first step that must be taken. Only until homosexuality is no longer a felony can work on other reform measures like adopting anti-discrimination legislation that forbids discrimination based on sexual orientation and gender identity/expression, as well as recognizing same-sex relationships, begin. Based on ILGA reports, any European countries still have a long way to go before they can be considered nations that accept and safeguard all LGBTI people's rights. (Schlagdenhauffen,2020)

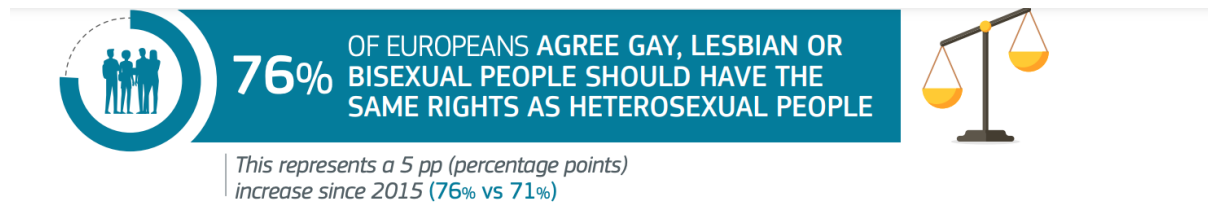
Despite major advancements in legislation and practices around the world pertaining to same-sex unions and Gay rights, public perception on the acceptance of homosexuality in society remains deeply divided by country, location, and economic development. The country in which people live has an impact on their attitudes toward homosexuality acceptance. In comparison to Western Europe and the Americas, Eastern Europe, Russia, Ukraine, the Middle East, and Sub-Saharan Africa are generally less accepting of homosexuality. The public in the Asia-Pacific region is divided in general. This is influenced by religious and political sentiments as well as a country's economic status. (Poushter and Kent, 2020.)

Today in Europe, lesbian, gay, bisexual, and transgender (LGBT) rights vary greatly by country. Sixteen of the 28 countries in the world that have legalized same-sex marriage are in Europe. Civil unions or other forms of restricted recognition for same-sex couples have been legalized in thirteen more European countries.

According to ILGA-Europe, Malta, Belgium, and Luxembourg are the top three European countries in terms of LGBT equality. Western Europe is frequently seen as one of the world's most progressive regions for LGBT people. (Rainbow Europe, 2021)

As can be seen from the following graphs from Eurostat, the acceptance and protection of the rights of LGBTQI society has been improving noticeably in recent years on the European continent. More and more people believe that the relationship between people of the same sex is not something special and also many people now start and support the marriage between people of the same sex. Since 2015 it seems that the situation in Europe has improved considerably without this meaning that all countries have shown the same progress or that there is still no room for development. Several European countries do not recognize same-sex unions in any form. In comparison to Western Europe, Eastern Europe is thought to have fewer legal rights and safeguards, poorer living conditions, and a less sympathetic public perception of LGBT persons. All European countries that allow marriage also allow same-sex couples to adopt. Hungary's constitution explicitly prohibited adoption for same-sex couples in December 2020, and the Hungarian parliament approved a law prohibiting the showing of "any content portraying or promoting sex reassignment or homosexuality" to minors in June 2021, similar to Russia's "anti-gay propaganda" law, based on IGLA-Europe reports. Thirteen EU member

states have criticized the law, calling it a violation of the European Union's Charter of Fundamental Rights.



AGREEMENT THAT GAY, LESBIAN OR BISEXUAL PEOPLE SHOULD HAVE THE SAME RIGHTS AS HETEROSEXUAL PEOPLE **VARIES WIDELY BETWEEN THE MEMBER STATES***



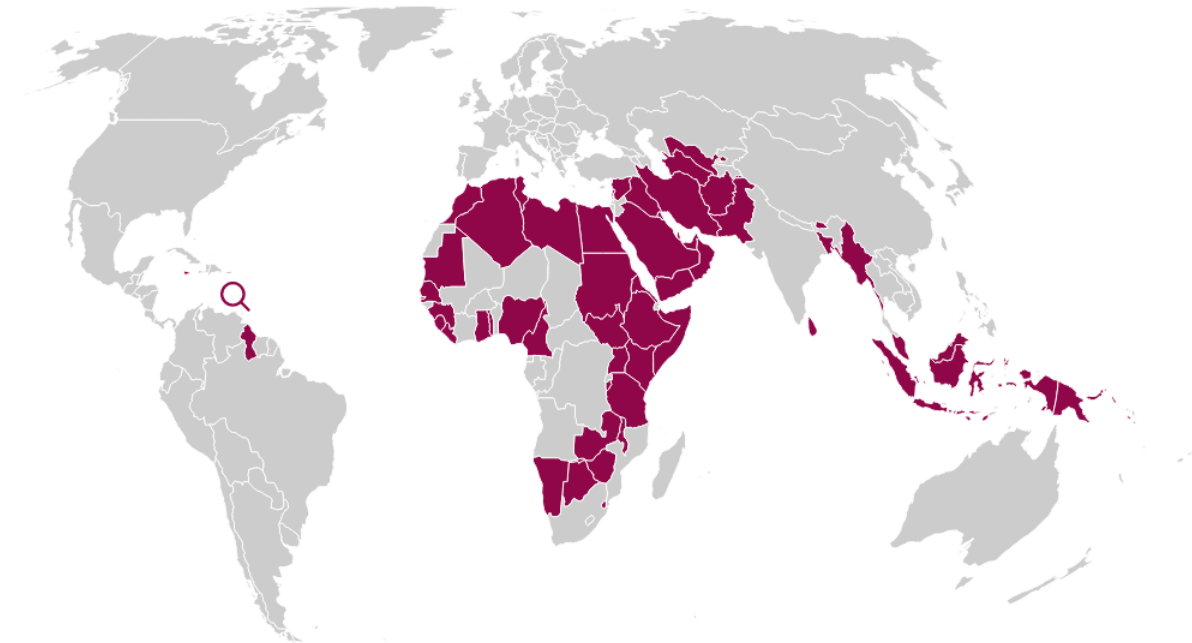
(Eurostat,2019)

Chapter 6

1. Homosexual asylum seekers, their origin, and their claims

Same-sex relations as a crime under domestic law shall analyzed at this point. I have chosen 4 countries to examine for different reasons each of them, but they all have in common the criminalization of homosexual relations. Based on everyday analysis and testimonies of people who fled their country due to a fear of being persecuted for their sexual orientation, the reader can evaluate the importance of laws and existing stereotypes in societies, affecting the lives of the LGBT community. Four countries caught my attention during my research; Afghanistan due to the situation prevailing in the country up until the previous year, Brunei due to the 'New Sharia law against gay people' established in 2019, Uganda because of the changes in the Penal Code of the country and lastly Iran, which is the only country, along with Saudi Arabia, where executions for same-sex activity have reportedly taken place in 2020, based on IGLA reports.

The map below provides an overview of the countries across the world where lesbian, gay, bisexual, and transgender people are criminalized.



Human Dignity Trust: Map of Countries that Criminalise LGBT People

Criminalization exists in 69 countries →

Africa (Algeria, Burundi, Cameroon, Central African Republic, Chad, Comoros, Egypt, Eritrea, Eswatini, Ethiopia, Gambia, Ghana, Guinea, Kenya, Liberia, Libya, Malawi, Mauritania, Mauritius, Morocco, Namibia, Nigeria, Senegal, Sierra Leone, Somalia, South Sudan, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe)

Asia (Afghanistan, Bangladesh, Bhutan, Brunei, Iran, Kuwait, Lebanon, Malaysia, Maldives, Myanmar, Oman, Pakistan, Qatar, Saudi Arabia, Singapore, Sri Lanka, Syria, Turkmenistan, United Arab Emirates, Uzbekistan, and Yemen)

Caribbean (Antigua and Barbuda, Barbados, Dominica, Grenada, Guyana, Jamaica, St. Kitts, and Nevis, St. Lucia and St. Vincent and the Grenadines)

South Pacific (Kiribati, Papua New Guinea, Samoa, Solomon Islands, Tonga, and Tuvalu)

Entities (Cook Islands, Gaza, South Sumatra and Aceh Provinces of Indonesia).

Punishable with the *death penalty* in 9 countries→ only in **Africa** (Mauritania and parts of Nigeria and Somalia) and **Asia** (Brunei, Iran, Qatar, Saudi Arabia, United Arab Emirates, and Yemen).

So-called *anti-propaganda laws*²² inhibit LGBT advocacy in 3 countries→ **Africa** (Nigeria²³) **Europe** (Lithuania, Russia)
(Mendos,2020)

- 67 jurisdictions criminalize private, consensual, same-sex sexual behavior, according to the "Human Dignity Trust" report. The bulk of these jurisdictions have laws that make sex between males illegal, such as sodomy,' 'buggery,' and 'unnatural offenses.' Commonwealth jurisdictions account for nearly half of them.
- 43 jurisdictions use laws against 'lesbianism,' 'sexual relations with a person of the same sex,' and 'gross indecency' to criminalize private, consenting sexual behavior between women. Lesbians and bisexual women have been arrested or threatened with arrest even in places where women are not explicitly criminalized.
- There are 11 jurisdictions where the death penalty is applied when there is a possibility of private, consenting same-sex sexual conduct. At least six of these countries — Iran, Northern Nigeria, Saudi Arabia, Somalia, and Yemen - use the death sentence, and the death penalty is a legal possibility in Afghanistan, Brunei, Mauritania, Pakistan, Qatar, and the United Arab Emirates.
- 15 jurisdictions use 'cross-dressing,' 'impersonation,' and 'disguise' laws to criminalize transgender people's gender identification and/or expression. Many additional countries have

²² In 2013, President Putin signed a new federal law prohibiting propaganda of non-traditional sexual relationships. Since then, it is against the law to spread positive information about gay, lesbian, bisexual, or transgender people (LGBT) among minors. Allegedly, children should not be misguided into believing that non-traditional relationships are equivalent to traditional (heterosexual) relationships.

²³ Nigeria appears in all three categories.

laws that criminalize same-sex activities, vagrancy, hooliganism, and public order violations, which target transgender persons.

The International Lesbian Gays and Trans Association (ILGA) discovered that homosexuality is outlawed in 67 of the 193 UN member nations in its December 2020 report, with two of those, Iraq and Egypt, outlawing it de facto but not by law. While there are no laws against homosexuality in Egypt, gay and bisexual people are prosecuted under other laws, the most famous of which being the Cairo 52.

Laws that make homosexuality illegal result in a slew of different but related infractions. Such laws infringe on an individual's right to be free from discrimination, as enshrined in article 2 of the Universal Declaration of Human Rights and key international human rights treaties, as well as the rights to be protected from unreasonable invasion of privacy and arbitrary detention, as enshrined in articles 12 and 9 of the Universal Declaration and articles 17 and 9 of the International Covenant on Civil and Political Rights, respectively. Moreover, laws that impose sanctions for sexual conduct violate the right to life guaranteed by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as the Universal Declaration's article 3 and the International Covenant on Civil and Political Rights, respectively. (UNHCR, 2012).

It is punishable by death in at least six UN member states, **Brunei, Iran, Mauritania, Nigeria (only northern Nigeria), Saudi Arabia, and Yemen**. In 2007, five countries carried out an execution as a punishment for gay behavior. According to ILGA, Iran and Saudi Arabia are the only nations where executions for same-sex behavior have been documented. Extrajudicial executions are carried out by militias such as Islamic State or Al-Qaeda in other countries such as Yemen, Iraq, and Libya. (Mendos, 2020). Sharia, which is an interpretation of the Quran and the Hadith, is the foundation of Islamic law. More and more Islamic academics are re-evaluating the teachings of the two guides about same-sex relationships. People's interpretations of the Quran, Islam's holy book, and the Hadith, or reports of the Prophet Muhammad's sayings, are what led to the adoption of the death sentence for homosexual activities. The methods of murder vary throughout the narratives, and some advice lenient punishments for gay conduct depending on the situation.

2. UGANDA

Unnatural Offenses, Section 145 of the Uganda Penal Code of 1950. The 145 section makes it illegal to have "carnal knowledge... against the order of nature," which is punishable by life in jail. Attempt to Commit Unnatural Offenses, Section 146, Penal Code of 1950²⁴. Section 146 makes it illegal to attempt to commit any of the crimes listed in Section 145, and it is punishable by seven years in jail. Section 148, Indecent Practices, of the Penal Code of 1950.²⁵ Acts of "gross indecency," which are punishable by seven years in jail, are prohibited under Section 148. The provision is gender-neutral, meaning it applies to both men and women.²⁶

Homophobia is a phenomenon in Uganda and throughout Africa, and LGBT people have long experienced prejudice. Many people are compelled to abandon their nations in search of destinations that will embrace them regardless of their sexual orientation. As Okello (2009) points out, forced

24 Penal Code 1950, Section 145 Unnatural Offences

25 Penal Code 1950, Section 146 Attempt to Commit Unnatural Offences

26 Penal Code 1950, Section 148 Indecent Practices

migration suggests that the countries that produce those forced migrants are inherently flawed in terms of conflict resolution, climate change, human rights violations, and bad governance. According to Hollander (2009), repealing homosexuality laws will be symbolic in that it will eliminate the barriers, but it will not create any new positive rights or change Ugandan society's culture. In Uganda, where homophobia tends to be engrained in the culture, defenders of LGBT rights encounter a range of barriers. To put it differently, just amending the policies and regulation will not ensure that homosexual people may exercise their rights. Because individuals on the ground in South Africa's shantytowns have not changed their cultural and spiritual views, harassment, murder, and stigmatization continue indefinitely. Policymakers, leaders, and the general public must be educated on the importance of treating all people with respect, regardless of race or gender, sexual preference, creed, culture, or other variables. Given the rapid pace at which society and ideas grow, LGBT people in Uganda and Africa will have to wait a long time to live happily and with full rights. (Okello, 2009)

Lesbian, gay, bisexual, and transgender (LGBT) Ugandans have sought protection and asylum in a variety of countries over the last decade, but never in such large numbers or with such prominent elevation as when Uganda's **Anti-Homosexuality Act** was passed in December 2013, further criminalizing same-sex conduct, restricting freedom of association, and inciting discrimination against LGBT persons. The 2014 Act was invalidated by the Constitutional Court because it was passed without a quorum by lawmakers. Between January 2014 and February 2015, at least 400 LGBT Ugandans sought safety and asylum in Kenya, according to UNHCR (the UN Refugee Agency) and other assistance providers in Kenya. The vast majority of those who were recognized were gay men in their late teens or early twenties. Apart from asylum seekers, there have been instances of LGBT Ugandans transferring to Kenya on a temporary basis, both legally (via an official border checkpoint) and illegally. International funders, local organizations, and refugee care providers, including the United Nations High Commissioner for Refugees (UNHCR), all struggled to respond. Meanwhile, the Kenyan government has taken a number of harsh steps against refugees in the country. Given the complexities of the push and pull dynamics at play, as well as the difficult backdrop in Kenya, stakeholders must explore a number of ways to address the reasons for Uganda's outflow as well as the current needs of LGBT forced migrants in Kenya. (Okello, 2009)

In Kenya Section 162 of the Penal Code makes it illegal to have "carnal knowledge... against the order of nature," punishable by 14 years in prison. This provision applies to male-to-male sexual activity. Attempt to Commit Unnatural Offenses, Section 163 of the Penal Code of 1930. Section 163 makes it illegal to attempt to commit the crimes listed in Section 162, punishable by seven years in jail. Indecent Practices Between Males, Section 165, Penal Code of 1930. Acts of "gross indecency" between men, as well as the acquisition or attempted procurement thereof, are prohibited under Section 165, which carries a five-year prison sentence.

The Ugandan High Court's repeal of the Anti-Homosexuality Act in August 2014 did little to change the hostile environment (Uganda: Anti-Homosexuality Act's Heavy Toll, 2014). Some Ugandan activists believe that the law's nullification emboldened the populace to take matters into their own hands because it was struck down on a technicality rather than for its content. Ugandan members of parliament petitioned for the bill to be reintroduced, and reports in November 2014 indicated that MPs were drafting a new law aimed at the LGBT community, the Prohibition of Promotion of Unnatural Offenses Bill²⁷. While specific episodes of arrest or assault played a big role in motivating many to

²⁷ The Bill creates various new offences, all of which can be loosely described as in some way "promoting" so-called "unnatural sexual practices". Clause 1 of the Bill defines an "unnatural sexual practice" as "A sexual act between persons of the same sex, or with or between transsexual person (sic), a sexual act with an animal, and anal sex, within the meaning of section 145 of the Penal Code Act." The Bill sets out various means by which "unnatural sexual practices" can be "promoted", acts which could be interpreted as including simply providing

migrate, others simply did not want to wait for something to happen because of the bill's general climate of fear.

In Kenya, UNHCR and its partners first prioritized the unexpectedly large number of new cases and rushed the resettlement of LGBT Ugandans. In a country where refugees wait years for resettlement, at least one Ugandan case moved quickly, taking only eight months from admission to resettlement in the United States. A UNHCR partner paid a monthly stipend to those who elected not to move to the Kakuma refugee camp, which was initially made accessible to all LGBT Ugandan asylum seekers in Nairobi. (Uganda: Anti-Homosexuality Act's Heavy Toll, 2014).

The Sexual Offenses Bill, which includes a section criminalizing same-sex partnerships, was passed by the Ugandan Parliament in 2021 (Uganda: Reject Sexual Offenses Bill, 2021). The bill, which imposes a five-year prison sentence for anyone who commit same-sex acts, is awaiting President Yoweri Museveni's approval. Many people believe the bill is a rehash of a similar law approved by Uganda's parliament in 2013, which was later overturned by the country's Supreme Court due to technicalities.

The new bill's main goal is to crack down on sexual violence in general, increasing the penalties for sexual offenders while also improving victim safety during sexual crime hearings. The new piece of legislation's overall goal is to give the law a broader application while removing some elements of the Penal Code Act.

The bill's primary goal, according to Jacob Oboth-Oboth, chair of the Legal and Parliamentary Affairs Committee, is to include articles on "post-penetration" consent, which relates to cases in which someone who originally agreed to consensual sexual relations changes their mind and withdraws permission. According to Oboth-Oboth, the new bill "protects victims of sexual violence both within and outside of marriages," and Pamela Nasiyo Kamugo, chairwoman of Uganda's Women Parliamentary Association (UWOPA), it is a major development because "it gives women the right to withdraw consent and cease sex upon realizing that the man may not be protected." (www.dw.com), 2021)

Human rights campaigners in Uganda have promised to contest the measure, seeing this as just another challenge in their fight for equal treatment. According to Frank Mugisha of Sexual Minorities Uganda, a regional LGBT+ organization, the restriction is "severe, uncalled for, and very regrettable." Mugisha's perspective is shaped not only by an uneasy sensation, but also by his experience with the 2013 Anti-Homosexuality Bill, which imposed the death penalty on anyone convicted of homosexual activities. Despite the fact that homosexual rights advocates successfully challenged the 2013 bill in the Supreme Court on legal grounds, many LGBT+ Ugandans are now concerned that the current draft just reintroduces elements of the previously discredited bill.

3. AFGHANISTAN

*Penal Code 2017, Section 645 Musahaqah. Section 645 criminalises same-sex intimacy between women with imprisonment for up to one year.*²⁸ *Penal Code 2017, Section 646 Sodomy. Section 646*

information on safe same-sex sexual activity, renting a room to a LGBT people or raising money for LGBT organisations.

28 Penal Code 2017, Section 645 Musahaqah

criminalises sodomy, punishable with imprisonment for up to two years.²⁹ Penal Code 2017, Section 649 Tafkhiz.³⁰ Section 649 criminalises Tafkhiz – same-sex intimacy between men absent penetration – punishable with imprisonment of between three months and one year.³¹ Penal Code 2017, Section 650 Ghavadi. Section 650 criminalises inciting two or more people to commit sodomy by introducing them to each other and finding them a place to do so. Sharia Law. Article 130 of the Constitution allows for the implementation of Sharia Law which prohibits same-sex sexual activity in general. The maximum penalty is death and is applicable in cases of sex between men or between women.³²

International worries about the safety and well-being of vulnerable communities, including lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI) Afghans, have arisen since the Taliban took control of Afghanistan in August 2021. Before the Taliban gained control, same-sex conduct was already illegal and punishable by death in Afghanistan, but the new regime's vow to rule under Sharia law puts the destiny of LGBTQI Afghans in considerably greater jeopardy.

An influx of LGBTQI migrants has begun, and it is expected to grow. The Taliban set an August 31 2021 deadline for all foreign soldiers to leave, requiring an immediate reaction from the international community to protect the most vulnerable during this moment of regime change. Canada was committed to receive 20,000 migrants, with a priority on women and LGBTQI individuals, among others, while Ireland has agreed to support LGBTQI and female Afghans seeking asylum. Although 98 nations have pledged to take in at least part of the Afghan refugees, the great majority have fled to Pakistan and Iran. Many of them escaping have landed in processing centers in Germany, Spain, Qatar, and Uzbekistan, among other countries. In several of the nations where LGBTQI persons have been transferred, they remain vulnerable due to their gender minority and sexual minority status. In Iran, same-sex interactions are punishable by death, and the death penalty is still a legal possibility in Pakistan and Qatar. In Uzbekistan, same-sex sexual relations are punishable by imprisonment. The political and social situation in this country is still unstable, so it remains to be seen how it will develop in the coming months and how neighboring countries will proceed to receive and assist migrants.

“As a woman, I will lose my freedom to study, to work, and live freely... As an LGBTQ+ member, I am not even recognized.” — Rani, a lesbian Afghan woman. (Pundir, 2021).

Discrimination based on sexual orientation and gender identity is common in Afghanistan. According to the US Department of State, being LGBTQI in Afghanistan is deemed "taboo" and "indecent." Mental and physical abuse, arrests, harassment, and violence are all common occurrences in the LGBTQI community. Article 130 of the Afghan constitution permits the application of Hanafi jurisprudence, which is a type of Sharia Law that outlaws same-sex sexual behavior between men and women and punishes same-sex sexual activity with death. Marriage must be between a man and a woman, according to Sharia and Afghan law.

In Shariah law, having sexual contact outside of marriage might result in a death sentence. Outside of marriage, same-sex sexual encounters are a type of sex. Since 2001, the state has not utilized the death sentence as a punishment for nonmarital sex, although Sharia law has been invoked to legitimize extrajudicial killings. In 2015, however, a wall was fallen on two males and a 17-year-old male for reportedly indulging in same-sex sexual conduct, according to the UN Assistance Mission in Afghanistan. The teen was harmed and the two men were killed (Reports on the protection of civilians in armed conflict, 2015). In 2018, a new penal law was enacted following the Taliban's collapse in

29 Penal Code 2017, Section 646 Sodomy

30 Penal Code 2017, Section 649 Tafkhiz

31 Penal Code 2017, Section 650 Ghavadi

32 Constitution of Afghanistan 2004, Art. 130

2001. While it did bring some modifications, such as lowering the maximum penalty for same-sex sexual conduct from death to life in prison, it also clearly criminalized the behavior. There are currently 69 countries that outlaw same-sex sexual relationships, although only nine of them have death penalty provisions. (Emadi,2019)

The LGBT community in Afghanistan will keep struggling as long as government officials do not try to treat the issue as a human rights issue and do not take measures to educate and enlighten citizens about sexual minorities and protect and defend their rights. Existing civil society and human rights organizations are unaware of the LGBT community's presence in the area. Due to their lack of visibility in the community, it is also exceptionally hard for the few revolutionary organizations fighting for drastic transformation to defend their rights and exert pressure on the international community working to rebuild Afghanistan to try to convince the Kabul regime to adopt measures in order to protect and preserve human rights, women's rights, and LGBT rights. (Emadi,2019)

4. IRAN

Penal Code 2013, Art. 233-234 Livat. Article 234 provides that 'livat' – defined under Article 233 as penetrative anal intercourse between men – is punishable with the death penalty.³³ Penal Code 2013, Art. 235-236 Tafkhiz. Article 236 provides that 'tafkhiz' – defined under Article 235 as putting a male sex organ between the thighs/buttocks of another man – is punishable with 100 lashes, or the death penalty if the active party is non-Muslim and the passive party is Muslim.³⁴ Penal Code 2013, Art. 237 Other Homosexual Acts. Article 237 provides that same-sex intimacy between men and between women other than 'liwat' or 'tafkhiz', such as "kissing or touching as a result of lust", is punishable with 31-74 lashes³⁵. Penal Code 2013, Art. 238-240 Musaheqeh. Article 239 provides that 'musaheqeh' – defined under Article 238 as a woman putting her sex organ on the sex organ of another woman – is punishable with 100 lashes.³⁶Based on Human dignity trust reports.

In 2013, Iran adopted a new penal code, which included significant amendments to provisions dealing with same-sex sexual conduct. Although sanctions have been more mild on the surface and in general, changes in the phrasing and categorization of sexual activities have had important symbolic and actual effects for sexuality management. In male same-sex intercourse, article 234 of the new penal code provides a clear distinction between two parties: the one who penetrates and the one who is penetrated. The latter is invariably sentenced to death, whereas the former can now be spared under

³³ Penal Code 2013, Art. 233-234 Livat "Article 233. Livat is defined as penetration of a man's sex organ (penis), up to the point of circumcision, into another male person's anus.

³⁴ Penal Code 2013, Art. 235-236 Tafkhiz. "Article 235. Tafkhiz is defined as putting a man's sex organ (penis) between the thighs or buttocks of another male person. Note- A penetration [of a penis into another male person's anus] that does not reach the point of circumcision shall be regarded as tafkhiz.

³⁵ Penal Code 2013, Art. 237 Other Homosexual Acts. "Article 237. Homosexual acts of a male person in cases other than livat and tafkhiz, such as kissing or touching as a result of lust, shall be punishable by thirty-one to seventy-four lashes of ta'zir punishment of the sixth grade

³⁶ Penal Code 2013, Article 238-240 Musaheqeh. "Article 238 Musaheqeh is defined as where a female person puts her sex organ on the sex organ of another person of the same sex.

specific conditions. The previous legal code made no such distinction, and all male same-sex sexual intercourse was punished with the death penalty.

According to Ahmed Shaheed, the UN Special Rapporteur on the situation of human rights in Iran (DHLAUTH)862577 - Search Results - United Nations Digital Library System, 2014), there is cause for concern. According to the study, Iran's gay, lesbian, bisexual, and transgender communities face widespread discrimination and ongoing human rights violations. "When it comes to gays, high-ranking officials use derogatory language, referring to them as subhuman or diseased," Shaheed added. In some cases, persons convicted of gay intercourse could receive the death penalty, while those spotted kissing, walking hand in hand, or just hugging could endure public lashings. According to the UN official, the Islamic Republic's authorities have legitimized violence against gays by both public officials and private residents by criminalizing consensual sex. Torture blows to the body, and in some cases, rape by law enforcement agencies and vigilante members of a group, he claimed, are examples of such brutality.

According to the UN official, gays, homosexuals, and bisexual Iranians are victims of arbitrary justice in Iran and should not expect fair trials for individuals convicted of a crime.

After Iranian Foreign Minister Mohammed Javad Zarif advocated the execution of LGBT people, the US accused Iran of violating fundamental human rights on Wednesday. At a joint press conference with German Foreign Minister Heiko Maas in Tehran on Monday, Zarif defended his country's harsh policies.

"Why have gays executed in Iran because of their sexual orientation?" a reporter from the German tabloid Bild wondered. He replied, "Moral principles exist in our culture. And we live our lives in accordance with these values. These are moral rules that govern people's behavior in general. And that implies that the law is respected and followed "after raging against the US and Israel's breaches of human rights

Maas, who was in Iran at the time to negotiate the nuclear deal's continuation, mostly ignored the matter (www.dw.com), 2019). Shadi Amin, an Iranian writer, and activist who now resides in Germany told DW-Farsi that the Iranian foreign minister's remarks had "outraged" her. "Humiliation, repression, and sexual harassment of a specific socioeconomic group should be scrutinized and criminalized," Amin stated.

"Zarif's violation of LGBT rights under the cover of moral ideals' demonstrates his contempt for human rights. Human rights include LGBT rights. Iran must not use religious or cultural justifications to violate them "she stated, "New laws have made society more aware of and accepting of differences."

"Many homosexuals tell us of abuse, torture, and threats faced by their families and friends. As long as the country's laws do not change, the situation of homosexuals in Iran will not improve," said Amin.

Finally, I suggest that any examination of LGBT rights in countries coping with human rights challenges must take into account local political, sociological, financial, and contextual conditions, since these dynamics may shed insight on the true meanings of rights and how laws are formed. Some religious scholars in Iran have even sought to reconcile Islam, particularly Shi'ism, with homosexuality and homoeroticism (e.g. Naraghi, 2010). Despite maintaining a severe stance to homosexuality, the new penal code in Iran has managed to make adjustments that may benefit certain males accused of homosexual activity, as we have seen. Iranian homosexual men and women have challenged cultural and political limits in everyday acts of visible and covert disobedience, in a way that echoes the wider resistance and opposition of women and youth against state-defined

dress and dating norms: "The open exhibition of resistance by youth, women, and increasingly middle-class men indicates a stronger coalition among society's segments than the authorities had envisaged." At the very least, these occurrences have blurred the lines, and officials are aware of this. In Islamic masculinities, there is a schism" (Gerami, 2003: 272).

5. BRUNEI

Penal Code 1951, Section 377 Unnatural Offences. Section 377 criminalises "carnal knowledge against the order of nature", punishable with up to ten years imprisonment and a possible fine. The law is only applicable to men³⁷. Syariah Penal Code Order 2013, Section 82 Liwat. Section 82 of the Syariah Penal Code criminalises 'liwat' (sexual intercourse between men), punishable in certain circumstances with death by stoning, or otherwise with whipping and imprisonment.³⁸ Syariah Penal Code Order 2013, Section 198 Man Posing as a Woman or Vice Versa. Section 198 of the Syariah Penal Code criminalises anyone who "dresses and poses" as the opposite sex in a public place "without reasonable excuse", punishable with up to three months' imprisonment, and a fine of up to B\$1,000. Where this is done for "immoral purposes" (undefined), it is punishable with up to one year imprisonment and a fine of up to B\$4,000³⁹. Syariah Penal Code Order 2013, Section 92 Musahaqah. Section 92 of the Syariah Penal Code criminalises 'musahaqah' (same-sex sexual activity between women), punishable with a fine of up to B\$40,000, imprisonment for up to 10 years, whipping not exceeding 40 strokes or a combination of any two of these.⁴⁰ For gay sex, the prior statute stipulated a maximum sentence of ten years in prison. Women convicted of having sexual intercourse with other women could face caning or a maximum 10-year prison sentence under the new rule.

Amnesty International (AI) has released its annual report on executions across the world. "The key result of our research is that the number of global executions has been declining — has dropped to the lowest levels we've seen in at least a decade," Chiara Sangiorgio, a death penalty opponent with AI, said. According to the organization, there were far fewer executions last year in nations like Iran, Pakistan, and Iraq than in prior years.

However, Sultan Hassanal Bolkiah underlined that individuals accused of engaging in homosexual or adulterous activities in Brunei will be executed overshadows the modest progress. Brunei's new sharia rules, which include death by stoning for gay sex and adultery, went into effect in 2019 (Global outcry as Brunei implements draconian sharia laws including death by stoning for gays | DW | 03.04.2019, 2019); theft is punishable by amputation, and abortion is punishable by public whipping. Individuals who expose Muslim children to religions other than Islam are also punished. Rape, robbery, and insulting the Prophet Mohammed is among the new offenses punishable by death in the small sultanate on the Southeast Asian island of Borneo (Talmon, 2019). Brunei is the first country in East

³⁷ Penal Code 1951, Section 377 Unnatural Offences. "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.

³⁸ Syariah Penal Code Order 2013, Section 82 Liwat

³⁹ Syariah Penal Code Order 2013, Section 198 Man Posing as a Woman or Vice Versa.

⁴⁰ Syariah Penal Code Order 2013, Section 92 Musahaqah

or Southeast Asia to impose the harsh Islamic legal system at the national level, which includes the cutting of limbs for thieves. Sharia law is followed to varying degrees in some Middle Eastern countries, notably Saudi Arabia. The act was justified in a statement from Hassanal Bolkiah, Brunei's ruler and prime minister. "The Sharia Law aspires to educate, respect, and protect the legitimate rights of all persons, society, or nations of various faiths and races, in addition to criminalizing and preventing activities that are against the teachings of Islam," according to Reuters.

Bolkiah's announcement generated outrage around the world and was widely condemned. The UN High Commissioner for Human Rights has urged Brunei's government to repeal a law "that will offer the death sentence for a broad range of transgressions, including adultery" and "consensual sex between gays," according to UN Human Rights Office spokesman Ravina Shamdasani. She also demanded that flogging and amputations not be used as punishments in the country. The German government summoned Brunei's ambassador to Berlin, expressing deep worry over the establishment of such stringent Sharia, or Islamic law (Talmon, 2019).

UN Secretary-General António Guterres criticized the measure. "We must redouble our efforts to eradicate these crimes as long as people face criminalization, hostility, and violence based on their sexual orientation, gender identity, or sex characteristics," said his spokesperson, Stéphane Dujarric. The new penal code, according to UNAIDS and the UN Population Fund, will have a "significant negative impact on overall health and wellbeing." According to the organizations, discriminatory laws penalize sexual orientation, same-sex relationships, and reproductive health care, and they disproportionately affect women and create barriers to health information and services.

According to Julia Ehrt, director of programs at the International Lesbian, Gay, Bisexual, Trans, and Intersex Association, Brunei's actions ran counter to a global trend toward decriminalizing homosexuality (ILGA). She noted that, after criminalizing same-sex sexual conduct in 2017, Chad was an example of legal regression, but that other countries had made some progress in defending against prejudice. The new law has sparked outrage among LGBTQ+ populations all across the world. Even Hollywood star George Clooney has called for a boycott of Brunei's opulent hotels. Regardless, the new law became effective on April 3rd.

According to APCOM foundation report, the bill will make conditions in Southeast Asia more dangerous for LGBTQ+ communities, and some activists in Brunei have already gone into hiding out of fear. ILGA claimed that at least ten countries execute persons who engage in gay behavior. Nonetheless, she points out that it is nearly impossible for an outsider to determine whether someone has been raped, engaged in homosexual intercourse, or committed adultery. (APCOM Foundation, 2020. *Countries that criminalise LGBTI*. Building Space for Lasting Change – LGBTI in Southeast Asia. APCOM Foundation.)

Experts think that because of the high bar of proof, draconian death by stoning regulations for sex between men and adultery, which can also be punished by caning, are unlikely to be implemented. Brunei hasn't carried out an execution in decades. According to "The Observer", young homosexual individuals in Brunei are more concerned about new legislation that empower ordinary people to commit acts of violence. Prosecutors must meet a high standard of proof, which includes a confession or at least four credible witnesses to a criminal act. Since 1957, no one has been executed under ancient capital punishment legislation that required hanging rather than stoning. "The implementation gives a lot of authority to a lot of conservatives who are really homophobic." Going out now is riskier for people like me," a gay Bruneian man told the publication.

6. Criminalization as a criminal offence under domestic penal law

Individuals who are attracted to others of the same sex are not the only ones who suffer when states outlaw same-sex relationships. Indeed, as explained below, criminalizing laws create an environment in which anyone who does not adhere to gendered stereotypes becomes a target for law enforcement and discriminatory violence (Amnesty International 2008). This pertains to current society's expectations about the embodiment of a specific "style of being" associated with non-normative sexual orientations (Ottosson 2010). In 47 of the states that criminalize same-sex relationships, the laws are applicable to both men and women, but only to sex between men in 27 of them (Ottosson 2010).

The pattern of solely criminalizing men derives from the invisibility of lesbianism in general, as many of the latter governments received their laws from England during colonization (Amnesty International 2008). "Actions against the order of nature," "carnal knowledge of any human or animal," "buggery," "sodomy," "lewd acts," "unnatural sex," and "gross indecency," are some of the terms used in criminalizing laws (Ottosson 2010). Such rhetoric has been related to pathologizing attitudes about non-normative sexual orientations, activities, and identities, as well as attempts to "treat" LGBTQ people (Amnesty International 2008; Narrain 2004). Same-sex activity is also linked to bestiality, child sexual abuse, and rape in such laws. (Ottosson 2010).

As we've seen, legal frameworks aren't always clear when it comes to regulating LGBTQ identities. However, assessing the existence of these laws as "crimes" is limited. The Universal Declaration of Human Rights, for example, asserts that all individuals are protected against discrimination for a variety of reasons, including the catch-all phrase "or another status" (UN General Assembly 1948, Art. 42). The phrasing of this impose that gender and sexual minorities should be protected. When the UN has looked into concerns of criminalization, it has attempted to use existing human rights mechanisms in cases where criminalizing legislation has been challenged. The Human Rights Committee decided in *Toonen v Australia* that criminalizing laws in Tasmania were in violation of the International Covenant on Civil and Political Rights, citing violations of Article 17 right to privacy and Article 2 right to non-discrimination on the grounds of "sex" (Tahmindjis 2005). Several other bodies have similarly agreed that the universal rights enshrined in their documents apply to gender and sexual minorities. (Corre[^]a et al. 2008).

Progress at the UN level has continued thanks to a 2011 Human Rights Council (HRC) resolution allowing for investigation of human rights abuses based on sexual orientation or gender identity, aided by CSO complaints. According to the findings, same-sex partnerships should be decriminalized (UNHRC 2011). A 2012 UN statement summarizes the status of sexual orientation and gender identity in international human rights law, including the assertion that criminalizing laws violate principles and rights of equality, privacy, and arbitrary arrests (UN Office of the High Commissioner for Human Rights United Nations Office of the High Commissioner for Human Rights [UNOHCHR] 2012). However, states that are accused of violating human rights are frequently singled out in a way that favors Western ways of life and portrays (white) Western human rights groups as saviors and guardians while neglecting human rights violations in their own countries (Mutua 2001).

Furthermore, the processes of imperialist oppression are frequently overlooked, and perspectives from individuals who have lived in the countries in question are disregarded (Mutua 2001). While it is necessary to recognize the role of frame-setting institutions such as the UN, it is also important to understand how only certain human rights violations in certain countries become the focus of global

campaigns. With this in mind, the social harm method opens up a larger range of possibilities for investigation.

Moreover, criminalizing laws and actions can perpetuate private-sector problems. While acts of violence occur in all countries, regardless of legality and social norms, they are more frequently committed in an atmosphere of impunity, and victims are hesitant to come forward because of the risk of self-incrimination. Criminalization entrenches discrimination against the vulnerable group in this setting. (Amnesty International 2008). Recorded instances of violence include lynching mobs, sexual attacks, mutilations, and torture (Amnesty International 2012; Human Rights Watch 2010; UNHRC 2011). Because of the persistent danger of violence, a number of lesbian and gay people have sought asylum in other countries, alleging that they are frightened of persecution and that the government will not protect them (Amnesty International 2008). People who do not comply to gendered, heterosexual norms live in an atmosphere where, despite their fear of violence, they are subjected to public scrutiny.

Conclusion

Even today, there are many countries where gay men and women, bisexuals, and transgender people face a great risk of death and have no choice but to emigrate. LGBTQ persons face discrimination, persecution, exclusion, assault, murder, and rape at the hands of governmental and non-state agents in their home nations. Many people are forced to migrate, and nations with progressive LGBTQ laws are the places where they seek refuge. The right to migrate is fundamental to everyone: ***“everyone has the right to free movement and residence within the borders of each state. Everyone has the right to leave and return to any country, including his own. Everyone has the right to seek and receive asylum from persecution in other nations.”*** The rights to freedom of expression and assembly (Articles 19 and 20 of the Universal Declaration of Human Rights) are also relevant. Both of these support the safeguarding of LGBTQ human rights, which include the freedom to express one's sexuality and the elimination of discrimination based on sexual orientation.

At the beginning of this postgraduate thesis, I tried to provide the reader with definitions of some key terms such as criminalization, same-sex relations, forced migration, international protection of human rights, and some definitional issues. In chapters two and three, there is an analysis of the European and International protective framework. The reader can easily understand the difficulties that exist at an international level to protect human rights and how easier is to protect those at the European level. Last but not least, in chapter 4 a brief reference was made to all countries which even today criminalize same-sex relations and acts. Finally, my analysis focuses on four countries and the retroactive laws that have been passed to limit the LGBTQI community in recent years.

LGBTQ rights have gained a significant importance and place in international diplomacy over the last decade, but support continues to be a source of contention within the international community. International organizations such as the United Nations have approved over the years resolutions in favour of LGBTQ rights, but formal declarations are frequently met with opposition by member nations unwilling to address their own records on the subject. LGBTQ rights do not have official recognition within the world's most powerful body of diplomacy as a result of this disagreement. Instead, informal organizations such as the LGBTI Core Group and individual UN agencies represent LGBTQ rights. This paper will look at the role of LGBTQ diplomacy in individual states as well as the United Nations. Case studies from Brunei, Iran, Afghanistan, and Uganda show that LGBTQ rights are often subject to domestic politics' whims and can be jeopardized even after good accomplishments. This study looks at the wide range of support for LGBTQ rights around the world, as well as the fragility of support in places where LGBTQ rights have already been established.

LGBT rights advocacy has the potential to reshape communities and establish international human rights norms in nations that have been resistant to their adoption in the past. The growing knowledge of LGBT rights across the Caribbean, Africa, Asia, Eastern Europe, and the Middle East encourages hope in a progressive arc of history. However, portrayals of a progressive West and Latin America vs a regressive remainder of the world obscure the rich complexity of LGBT rights and acceptance inside each society. Countries whose governments have made formal pledges to LGBT rights but have seen these obligations eroded as society and internal politics have changed. To make LGBT rights a global reality, countries must uphold their local human rights obligations while advocating for change on the international stage.

Failure to deliver the protection of human rights is apparent, and it demands accountability on its own terms. Human beings return to ideals of justice with hope, while also acknowledging the limitations of attempts to achieve them. Human rights are fundamental in our day. LGBTQ people, have a right to demand participation in the human rights political movement, whatever its flaws. The only way to overcome these flaws is for numerous LGBTQ advocates and allies to fight their daily battles to bend

and handle human rights practice—politics, theory, institutions, and organizations—into the shape prophesied by its emancipatory aspirations.

In recent decades, global efforts for lesbian, gay, bisexual, transgender, queer, and other (LGBTQ+) people have made great headway, particularly in the area of marriage equality. Except from this, LGBTQ+ individuals in many nations continue to face repression, jail, and even death. Given the severity and widespread nature of such abuses, activists and a growing number of governments have prioritized laws and measures to protect this community from institutional discrimination and political, social, or economic marginalization.

Civil society groups have worked for the recognition of human rights centered on gender identity and sexual orientation since the UN's creation in 1945. Discrimination based on sexual orientation was not recognized as a breach of international humanitarian law until the *Toonen v. Australia* case, which was heard before the United Nations Human Rights Committee in 1994. As case law in the area slowly evolved and instances of LGBTQ+ human rights violations gained increased attention, a group of independent experts met in Indonesia in 2007 to articulate specific guidelines for international norms for human rights and their application to issues related to sexual orientation. Their efforts culminated in the **Yogyakarta Principles**, which have served as a touchstone for LGBTI rights.

Despite the efforts made from the international community, discrimination and criminalization of same-sex sexuality still exists. Everyday people from different parts of the world leave their houses seeking a better and more profitable future for them. Even in my country, Greece, among the huge number of migrants and immigrants we welcome every year, they are a lot of people who decided to leave their country behind and take the long road to Europe in search of the right to diversity, as in many countries, different sexual orientation is considered a crime punishable by imprisonment, humiliation or even torture.

In my country Greece, The Bisexual Support Association has supported asylum applications of LGBTI refugees from Egypt, Syria, Lebanon, Iraq, Afghanistan, Syria, Pakistan, Iraq, Afghanistan, Pakistan, and Yemen. Of these in 2016, nine applicants were recognized as refugees in Greece. As the President of the Association, Mrs. Galanou explains, *"when we talk about refugees seeking protection on the grounds of sexual orientation or gender identity, we should point out that they come from countries that are not necessarily at war, as in 69 countries around the world homosexuality or transgender status is illegal, and in nine of them the death penalty is in force"*.

Even in states where same-sex sexual conduct is not prohibited, officials frequently overlook mistreatment and murder of LGBTQ+ people by police officers, militant groups, street gangs, and even family members. In countries where state power is limited, forced marriages, so-called honor killings, and the use of rape to change a victim's sexual orientation or gender identity continue to endanger lives. These acts of violence are particularly dangerous for transgender people. Conservative interpretations of religious texts are frequently used to marginalize sexual minorities and justify discrimination against them in some Catholic and Muslim majority states with a history of authoritarianism. LGBTQ+ persons in Central America, for example, experience systemic discrimination, persecution, and a high risk of homicide, leading to a recent influx of LGBTQ+ people seeking asylum in the United States.

Despite the fact that LGBTQ+ individuals experience marginalization and repression in every part of the world, their human rights have progressively improved. By emphasizing LGBTQ+ rights as a foreign but also national priority, we have an opportunity to further promote them. We can only hope that the next generations will not confront the same discrimination and racism within societies. Human rights will be respected by all and for all.

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